Framan Mechanical Inc. *and* Plumbers and Pipefitters Local Union No. 9, UA. Cases 22–CA–23845 and 22–CA–24031

October 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 21, 2001, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

This case concerns allegations that the Respondent committed a number of unfair labor practices in the wake of a union organizing effort by some of its plumbing/pipefitting employees in early 2000.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by: interrogating employees about their union activities; creating the impression that its employees' union activities were under surveillance; and threatening employees with job loss if they selected a union to represent them.

The judge also found that the Respondent violated Section 8(a)(3) and (1) by: laying off employees Brian Yutko and Kenyatte Wingo;[2] demoting employee Edgar Harris from journeyman to apprentice, reducing his pay, issuing him two written warnings, and laying him off; and issuing a written warning to employee Thomas Lanza and laying him off. For the reasons described below, we disagree with these findings and we reverse them accordingly.[3]

II. BACKGROUND

A. The Respondent's Business

The Respondent is a contractor based in Freehold, New Jersey, that provides plumbing, pipefitting, HVAC, ductwork, and sprinkler services.[4] Frank Manginelli is the Respondent's president and owner.

The Respondent frequently bids on public construction projects in the State of New Jersey. The contracts pertaining to these projects are governed by the New Jersey Prevailing Wage Act,[5] which requires contractors—even those that are not unionized—to pay wages at the union contract rate.

In early 2000,[6] the time period at issue, the Respondent's plumbing/pipefitting work force consisted of, among others, Foreman Frank Calello;[7] journeyman plumber/pipefitters Pete Felenczak, Vinnie Leto, Thomas Lanza, and Brian Yutko; and plumber-apprentices Edgar Harris, Eric Christ, and Kenyatte Wingo. Yutko and Wingo were the two least senior of these employees. The judge found that these individuals were included in a "core group" of employees that the Respondent made every effort to keep employed; in this regard, the Respondent frequently moved employees in the "core" group from project to project as the need arose.[8]

During the relevant time period, the Respondent was working on three projects of particular relevance to the events of this case: (1) an HVAC contract for the biology building at the College of New Jersey (CNJ);[9] (2) a plumbing contract for the science building at CNJ; and (3) a sprinkler contract for the Newark Armory. These were "lump sum" contracts, under which the Respondent agreed to complete the contracted-for work by a certain

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The complaint alleges that Yutko and Wingo were "laid off"; however, the judge found that they were "discharged." Nonetheless, in parts of his decision, the judge states that Yutko and Wingo were "laid off." In its exceptions, the Respondent contends that it intended to "lay off"—rather than "discharge"—Yutko and Wingo. The Respondent's stated intention is confirmed by the fact that it subsequently offered to recall Yutko from layoff status. Since the complaint alleged that the Respondent unlawfully laid off Yutko and Wingo, and since the facts are not inconsistent with this allegation, we find that the issue here is whether the Respondent unlawfully laid off Yutko and Wingo.

[3] There are no exceptions to the judge's findings that the Respondent did not interrogate employees and threaten them with job loss, in violation of Sec. 8(a)(1), by soliciting questions from employees at an employee meeting on February 15, 2000, and by telling employees that, if a collective-bargaining agreement were in place, the Respondent might not be able to employ them on jobs in other parts of the state. Further, there are no exceptions to the judge's finding that the Respondent made valid offers of reinstatement to Yutko, Harris, and Lanza in June of 2000.

[4] Even though the Respondent employs other types of employees, such as sheetmetal workers, the only employees involved in this case are plumbing/pipefitting employees.

[5] See, e.g., N.J. Stat. Ann. § 34:11–56.25 et. seq.

[6] All dates herein are in 2000, unless otherwise noted.

[7] The Respondent has conceded that Calello is a supervisor under Sec. 2(11) of the Act.

[8] The judge apparently based this finding on Manginelli's testimony (see Tr. 1248–1250).

[9] This project required the Respondent to use plumbers/pipefitters, as well as sheetmetal workers.

period of time and for a certain price. The CNJ contracts in particular contained liquidated damages provisions, under which the Respondent would incur a specified amount of liability for each day the project went over schedule.

The contracts allowed the Respondent some flexibility so that, if it was unable to meet a deadline through no fault of its own, it could request more money from CNJ and/or could sue the party that was originally at fault for the delay if a subsequent dispute arose. Further, the CNJ contracts allowed the Respondent broad discretion in making decisions regarding the methods, means, and manpower it would employ in performing the contracted-for work.

The Respondent began HVAC work on the CNJ biology building in August 1998, and it completed this work in August 2000. In the fall of 1998, the Respondent also began work on the CNJ science building project. This project consisted of eight "phases" that involved several connected buildings within the science building complex. Phase 1 of the project, which began in October 1998, involved the chemistry, physics, and mathematics buildings; phase 1 was scheduled to be completed by June 15, 2000. Phase 2, which involved the demolition of old plumbing and fixtures and the installation of new piping and fixtures in the former nursing building, which was originally scheduled to begin September 1, 1999, actually began in November 1999. The entire project was scheduled for completion by August 15, 2001.[10]

B. Delays in the Science Building Project and the Respondent's Requests for Relief

By the summer of 1999, there were substantial delays in the science building project that were primarily caused by the general contractor. As a result, the project fell approximately 4 months behind schedule. In order to avoid liability for liquidated damages, the Respondent's president and owner, Manginelli, sent a letter on September 13, 1999, to Cambridge Construction Management, the construction management company for the project, requesting a "change order" that would permit the Respondent to add "four mechanics for a period of 17 weeks *once the job starts moving at a good pace*" (emphasis added) (R. Exh. 18). The next day, Cambridge denied this request and asked the Respondent to provide more detailed information to substantiate its claim that it needed additional manpower (R. Exh. 19). In response, Manginelli retained William Loew, a private claims consultant, to assist the Respondent in obtaining an extension of time or a change order allowing for additional compensation.

Although not mentioned by the judge, Loew testified without contradiction that Manginelli contacted him in October 1999, and that Manginelli wanted to protect his interest on the project both by obtaining additional time to complete his work and thus avoid liquidated damages, and by obtaining additional compensation for the delays which he was experiencing and which he thought he would continue to experience on the project. Loew further testified that he recommended to Manginelli that he write a letter to Cambridge requesting an extension of time because the CJS contract documents required that a request for an extension of time be given on a timely basis. He also recommended that Manginelli warn that if the extension of time were not given, it would "create what we know . . . as a 'constructive acceleration' at the end of the project."[11] (Tr. 929.)

Manginelli sent this second letter to Cambridge on December 10, 1999, requesting, as Loew recommended, an extension of time based on the fact that the science building project was now 6 months behind schedule. The letter stated, in relevant part: "[I]f our request for an extension of time is not granted, we will be required to accelerate our work. This in turn will cause us to suffer labor inefficiency in the form of disruption, crowding and acceleration (increased crew size, overtime, multiple shifts and loss of morale)" (GC Exh. 24). On December 29, 1999, Cambridge, through its Project Executive Brian Murray, again denied the Respondent's request for an extension (GC Exh. 25).

Nonetheless, Manginelli persisted in seeking an extension or a change order. In early February, he requested that Loew analyze and report on the status of the science building project. Loew requested that Bob Cary, a lead schedule engineer, visit the science building project and issue a report. Cary visited the science building on February 9 and submitted his notes to Loew on February 10

[10] The proposed beginning and completion dates for the eight phases are set out in Cambridge Construction Management's "Phasing Scheme" of Aug. 25, 1998 (GC Exh. 11c):

Phase 1:	10/11/98–6/15/00	Phase 5:	6/15/00–8/15/00
Phase 2:	9/1/99–6/15/00	Phase 6:	7/15/00–11/15/00
Phase 3:	6/15/00–11/15/00	Phase 7:	8/15/00–6/1/01
Phase 4:	6/15/00–3/15/01	Phase 8:	8/15/00–8/15/01

[11] Loew explained that a "constructive acceleration" occurs when "[t]here's no order to accelerate, but the owner by its wrongful refusal to give an extension of time in fact creates an acceleration situation constructively." (Tr. 981.) As Loew explained, constructive accelerations cost contractors money because "once you have a building, you have a finite amount of space. Once you start putting in the plumbers [sic], the finish trades in a confined space; and you're rushed to get done at the end of the project, you get congestion and you lack . . . efficiency on the project, which cost the contractor money." (Tr. 934.)

(GC Exh. 26). Based on his analysis, Cary concluded that phase 1 was 4.5 to 5 months behind the target date of June 15, 2000. Loew further testified that he made a "quick verbal report" to Manginelli between February 9 and February 14 (Tr. 971) and that he sent Manginelli a letter on February 14 that reported the results of Cary's findings (GC Exh. 27). Loew concluded that the project was 4-1/2 months behind, and that, if the Respondent did not get the relief it requested, it stood to lose approximately $150,000 in contractual liquidated damages. (Tr. 959.) However, Cambridge never approved an extension or change order.

By February, the science building project was seriously delayed, and sprinkler work, which was scheduled to start in the nursing building at that time, could not begin.

C. The Union Organizing Effort

Around December 1999, employee Yutko telephoned the Union and was referred to organizer Thomas Tighe, who, in turn, spoke with Yutko about the possibility of union representation at the Respondent. Tighe then contacted a number of other employees, including Harris, Lanza, and Leto, either by telephone or in person. Yutko, Wingo, Harris, and Lanza, among others, signed authorization cards. Leto, however, refused to sign a card. The record reflects that, by February, the Respondent was at least generally aware that some of its employees had spoken with the Union.

On February 11, Manginelli had individual discussions with some employees, including Harris and Lanza, about the union organizing effort. During these discussions, Manginelli revealed that he was aware that employees had been talking to the Union and that he was specifically aware that Harris had done so.[12] Manginelli also questioned Harris and Lanza about their discussions with the Union and made statements indicating that employees might lose their jobs if a union came in, and that Manginelli could no longer trust Harris and Lanza because they had spoken with the Union. As set out above, we agree with the judge's findings that the Respondent's conduct violated Section 8(a)(1).

We will now discuss in turn the 8(a)(3) violations found by the judge and explain our reasons for reversing his findings of these violations.

[12] During Manginelli's discussion with Lanza, Lanza informed Manginelli that Lanza too had spoken with the Union.

III. THE 8(a)(3) ALLEGATIONS

A. The Layoffs of Yutko and Wingo

1. Facts

In early February, the three plumbing/pipefitting employees working at the science building project were Yutko, Wingo, and Felenczak. Felenczak was the lead journeyman plumber/pipefitter on the project. On February 10, the Respondent laid off Yutko and Wingo, who, as noted above, were its two least senior plumbing/pipefitting employees for the asserted reason that delays in the science building project where they were working had resulted in a shortage of work. The next day, the Respondent transferred plumber-apprentice Christ from its project at the Newark Armory to the science building project. Thus, during the week following these layoffs, the Respondent employed Christ and Felenczak at the science building project.

Soon after Yutko and Wingo were discharged, the Respondent employed Manginelli's brother-in-law, Mike Durkot, to work at its project at the Newark Armory. Lanza, whose testimony the judge generally credited, testified that he worked at the Newark Armory from February 7 until March 13, when he was assigned to the biology building. (Tr. 834–835.) Lanza further testified that Durkot, who was a computer programmer, not a plumber, came to work with him at the Newark Armory in the middle of February (Tr. 829) and worked with him for about 6 weeks, until Lanza's assignment to the biology building. (Tr. 832.) Lanza testified that Durkot was a "general helper" who helped Lanza "remove ceiling tile, drill holes, install hangers, helped cut pipe and install pipe." (Tr. 832.)

In early March, the Respondent subcontracted the sprinkler work at the Armory to Preferred Sprinkler, a subcontractor it routinely used for this type of work. It then transferred Lanza, who had been assigned to do sprinkler work there, to its biology building project.

2. Findings

Applying the analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the Respondent violated Section 8(a)(3) and (1) by discharging Yutko and Wingo on February 10. We disagree.

In *Wright Line*, supra, the Board established the analytical framework for determining whether an employer has discriminated against an employee in violation of Section 8(a)(3). Under that framework, in which unlawful intent is an essential element, the General Counsel must first, by a preponderance of the evidence, make a showing "sufficient to support the inference that pro-

tected conduct was a 'motivating factor' in the employer's decision."[13] 251 NLRB at 1089. Only if the General Counsel makes such a showing, is the burden on the employer "to demonstrate [by a preponderance of the evidence] that the same action would have been taken even in the absence of the protected conduct." Id. The ultimate burden remains, however, with the General Counsel. Id. at 1088 fn. 11.

Here, the judge found that the General Counsel met his initial burden of proving that Yutko's and Wingo's union activities were a motivating factor in the Respondent's decision to lay them off. The Respondent contends that it would have laid them off even in the absence of their union activities. In this regard, the Respondent asserts that there was a substantial reduction in work on the science building project due to delays on that project, and that, therefore, there was not enough work to warrant Yutko's and Wingo's continued employment. The Respondent further claims that, because it could not obtain an extension or change order, it stood to lose over $150,000 in liquidated damages as a result of the delays, and it had to cut labor costs because these were the only costs within its control. Thus, the Respondent maintains that, because it only had enough work for two plumber/pipefitters, it laid off Yutko and Wingo because they were the two least senior employees, and instead employed on the project two more senior employees—Felenczak, who had already been working there as the lead plumber/pipefitter, and Christ, an apprentice whom it transferred from the Newark Armory.

The judge found, however, that the Respondent did not establish a persuasive economic justification for the layoffs of Yutko and Wingo. In reaching this conclusion, the judge focused on the first two phases of the science building project and framed the issue as whether Respondent was forced to lay off Yutko and Wingo because of a lack of work. Although the judge acknowledged that the science building project had suffered serious delays, he found that there was nonetheless sufficient work for Yutko and Wingo on that project. In so finding, the judge—presumably based on the Respondent's request for more manpower and an extension of time on the project—theorized that the delays would result in the need for more, rather than fewer, employees. He also relied on the credited testimony of Cambridge Project Executive Murray and CNJ field superintendent Rogers that there was enough work for three or four employees on the project.[14]

Additionally, the judge found that the Respondent's shifting around of employees following the layoffs of Yutko and Wingo demonstrated that the Respondent had, in fact, enough work *somewhere* for Yutko and Wingo. At the outset, the judge pointed out that the fact that Christ was not even transferred to the science building project until after the discharges undercut the Respondent's argument that it only had enough work for two plumbing/pipefitting employees—Christ and Felenczak. In addition, the judge noted that the Respondent hired Manginelli's brother-in-law, Durkot, to "replace" Christ after he was transferred. In light of the Respondent's hiring of Durkot, the judge implicitly reasoned that the fact that the Respondent—which the judge found had a policy of trying to keep its "core" group of employees employed—had work at the Newark Armory that warranted this hiring further undermined its argument that it had no work for Yutko and Wingo. Finally, the judge appears to have found that the Respondent deliberately took work from its employees by subcontracting the sprinkler work at the Armory.

Relying on this analysis, the judge implicitly concluded that there was not, in fact, a shortage of work that warranted the layoffs of Yutko and Wingo, and that the Respondent used this as a pretext for laying them off because they had engaged in union activity. We find that the record neither supports the judge's analysis nor justifies his conclusion.

Although the judge questioned the economic efficacy of the Respondent's decision to lay off Yutko and Wingo and found it wanting, we emphasize at the outset that "the crucial factor is not whether the business reason cited by [the employer was] good or bad, but whether [it

[13] To satisfy his initial burden of showing discriminatory motivation, the General Counsel must show that the employee engaged in union activity, that the employer knew of the union activity, and that the employer exhibited antiunion animus. Member Schaumber notes that the Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element the necessity for there to be a causal nexus between the antiunion animus and the adverse employment action. See, e.g., *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), Member Schaumber agrees with this addition to the formulation.

[14] It appears that William Rogers, CNJ's field superintendent for the project, disagreed with the Respondent's decision to lay off Yutko and Wingo and use the two-man team of Christ and Felenczak, because Yutko and Wingo had been working on gas piping in the chemistry section of the science building, and this work had not yet been completed. At the hearing, Rogers testified that he was also generally concerned about the Respondent's staffing of this project because there was work to be done in the chemistry, physics, and nursing sections of the science building, but the same individuals were jumping to and from the three locations, and nothing was being completed. Rogers testified that there was sufficient work for three or four plumbers at the science building. Murray, the project executive for Cambridge, also testified that there was enough work for three or four plumbers on that project.

was] honestly invoked and [was], in fact, the cause of the change." *Ryder Distribution Resources,* 311 NLRB 814, 816 (1993), quoting *NLRB v. Savoy Laundry,* 327 F.2d 370, 371 (2d. Cir. 1964), enfg. in part 137 NLRB 306 (1962). Further, in making this determination, it is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful. Id. For the following reasons, we find that the Respondent relied on valid, nondiscriminatory business considerations in laying off Yutko and Wingo.

Assuming arguendo that the General Counsel met his initial burden of proving that the layoffs were unlawfully motivated,[15] we find that the Respondent has shown that it would have laid off Yutko and Wingo even in the absence of their union activities. In reaching this conclusion, we do not limit our inquiry, as the judge did, to phases 1 and 2 alone and in isolation. Rather, we consider the issue of whether the Respondent's decision to lay off Yutko and Wingo was justified by a demonstrated need to reduce labor costs caused by the delay in the science building project considered as a whole.

The Respondent has presented overwhelming evidence that the science building project where Yutko and Wingo were working was fraught with serious delays. As the Respondent has demonstrated, it stood to incur losses in the six figures as a result of its inability to obtain any relief from the economic effects of these delays. Faced with such losses, the Respondent was forced to cut costs from the project. Since labor costs were the only costs it could possibly cut in these circumstances, it decided to lay off Yutko and Wingo, who were, as noted above, the two least senior of its plumbing/pipefitting employees. Significantly, the Respondent did not hire any new plumbing/pipefitting employees after these layoffs. Rather, in June, apparently when work picked up, the Respondent recalled Yutko to work. The fact that Yutko declined the offer does not alter the fact that, as the judge found, the offer was valid.

Contrary to the judge, we believe that the Respondent had no choice but to reduce its work force at the science building project so that it could recoup–or at least minimize—its potential losses. It is common knowledge that, in the construction industry, work fluctuates and that unexpected events may occur that require an employer such as the Respondent to adjust its work force accordingly so that the project is completed in a timely, cost efficient manner. In recognition of this, the Respondent's contract with CNJ for the science building project gave it control over the methods, means, and manpower it chose to utilize in performing work on the project. On this record, we find that the Respondent has established that Yutko and Wingo were laid off for legitimate economic reasons.[16]

The difficult economic circumstances surrounding the science building project, and the Respondent's need to respond to them by cutting its work force, were not altered by the fact that some union organizational activity had taken place around the same time. In similar circumstances, the Board has recognized an employer's right to exercise its business judgment in times of financial difficulty, even in the context of union organizational activity. In *Gem Urethane Corp.,* 284 NLRB 1349 (1987), for example, the Board found that the layoff of 23 employees during a union organization effort did not violate the Act because it was undisputed that the employer was experiencing financial difficulty that necessitated the discharges. In reaching this finding, the Board declined to substitute its judgment for that of the employer, and stated that the issue of "[w]hether procedures other than a layoff might have been more or equally effective in remedying the Respondent's economic loss is not a matter the Board is empowered to decide." Id. at 1350.

Our dissenting colleague maintains that the judge was warranted in finding that the Respondent's explanation for laying off Yutko and Wingo was "pretextual." In so finding, he essentially relies on the following: (1) the Respondent's "predictions" that the delays in the science building project would result in the need for more employees; (2) the testimony of Cambridge Project Executive Murray and CNJ Field Superintendent Rogers to the effect that there was sufficient work at the project for three or four plumbing/pipefitting employees; and (3) the Respondent's hiring of Manginelli's brother-in-law, Durkot, to perform work at the Newark Armory after

[15] As noted above at fn. 13, as part of its initial burden, the General Counsel must show that the employee was engaged in union activity and that the employer knew of that union activity. In the present case, as explained above, the Respondent was generally aware of union activity in early February, but the record does not indicate that it had direct knowledge that Yutko and Wingo were engaged in union activity when it laid them off. At sec. II(c), par. 8 of his decision, the judge implicitly found that the Respondent knew of Yutko's and Wingo's union activities when it laid them off. We will assume, arguendo, that the judge's inference of direct knowledge is not erroneous. Cf. *Music Express East, Inc.,* 340 NLRB 1063 (2003).

[16] In so finding, we emphasize that the Respondent's consistent testimony was that there was a slowdown in work and that the Respondent corroborated this testimony with documentary evidence. Thus, the facts here are readily distinguishable from those in *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004), where, in adopting the judge's finding that the respondent violated Sec. 8(a)(3) by laying off three employees, we emphasized that the respondent's witness "gave inconsistent and uncorroborated testimony regarding the slowdown of available work," and that the testimony was unsupported by any documentary evidence.

Christ was transferred to the science building project. These contentions have no merit.

Our dissenting colleague refers, first, to the "predictions" made by the Respondent prior to the layoffs of Yutko and Wingo—as purportedly evidenced by its requests for additional manpower and an extension of time—that the delays in the science building project would result in its needing more, rather than fewer, employees. We disagree with our dissenting colleague's contention that these predictions are inconsistent with the Respondent's subsequent need to cut its work force at that project. These were merely the Respondent's predictions; they do not constitute evidence that there was, in fact, enough work.

Significantly, as Loew's uncontradicted testimony, set out above, makes clear, these predictions were made solely to support the Respondent's requests for additional manpower and an extension of time to complete the project as a whole. The requests were not limited, as the judge apparently found, to phases 1 and 2 alone. Further, there is no evidence that they formed any basis for the Respondent's decisions regarding the actual staffing of the science building project. Indeed, the Respondent's September 13, 1999 letter speaks of the need for mechanics "once the job starts moving at a good pace." Obviously, the job was not "moving at a good pace" in February. Accordingly, contrary to our dissenting colleague's assertion, it cannot be said that the September 13, 1999 letter evidenced that the Respondent needed more plumbers in February. Further, as Loew's testimony also made clear, the December 10, 1999 letter's reference to the need for "acceleration" of work with consequent need for "increased crew size" had as its timeframe the end of the project as a whole—scheduled for summer 2001—not phases 1 and 2. Simply put, there is no reason, as an evidentiary matter, to limit the application of the Respondent's September 13 and December 10, 1999 letters to phases 1 and 2, and the judge erred by doing so. By relying on the judge's flawed analysis to adopt his result, our dissenting colleague only compounds the error.

Our dissenting colleague further contends that the testimony of Murray and Rogers demonstrates that there was work on the science building project for three or four employees. Relying on this testimony, our dissenting colleague has substituted the judgment of these individuals—who were, at most, peripherally involved with the Respondent's work on the project—for the Respondent's knowledge of its *own* business operations and staffing needs. Our dissenting colleague asserts that the above testimony was implicitly credited over President and Owner Manginelli's testimony that there was only enough work for two employees. However, the fact is that Murray and Rogers merely gave their *opinion* that there was work for three or four employees; Manginelli gave a contrary, albeit more informed, opinion. As we see it, all of these witnesses are credible insofar as they each gave an honest opinion as to the staffing requirements of the science building project.[17] What matters, though, is that the Respondent, as the manager of its business operations and employees, is the party that is most knowledgeable about its manpower needs—and its potential liability—at the science building project, considered as a whole, as well as its manpower needs at other projects, and it is the Respondent that gets to "call the shots" at the end of the day. The contract for the science building project recognizes as much, as it gives the Respondent flexibility in determining its staffing needs. We also note that, because there is no evidence that the Respondent subsequently hired new plumbing/pipefitting employees, Manginelli's opinion turned out to be well-founded. Finally, that the Respondent did not need to keep Yutko and Wingo on the science building project to maintain a successful pace of work is demonstrated by the fact that the Respondent was never written up or otherwise issued a warning for delaying the progress of the project.

Finally, our dissenting colleague asserts that, even if there was not enough work on the science building project for Yutko and Wingo, the evidence in the record shows that the Respondent had work available for them elsewhere—as primarily evidenced by the fact that the Respondent hired Durkot to work at the Newark Armory, where Christ had been working prior to his transfer to the science building project.[18] Our dissenting colleague postulates that the Respondent, in the interest of keeping its "core group" of employees employed, could have allowed Yutko and Wingo to work at the Armory instead

[17] In this regard, we note that at the hearing, the judge observed to Loew, who was testifying, that the opinions offered by Murray and Rogers were different from Manginelli's. Loew responded: "Well, because they were writing the checks, okay. They get paid on a time and material basis. Mr. Manginelli works on a lump sum basis. Their motivation is totally different." (Tr. 966–967.)

[18] Our dissenting colleague also points out, as the judge did, that Christ, one of the two employees for whom it had work at the Science building project, was not even transferred to the project until after Yutko and Wingo were laid off. We do not find this fact to be significant. As discussed above, the Respondent has a great deal of discretion in making decisions regarding the staffing of its own projects. Thus, given its determination that there was only work for two employees on the science building project, it was well within its rights to transfer Christ, who was more senior than Yutko and Wingo, over to that project to work with Felenczak, and to lay off Yutko and Wingo. Having found that these layoffs were based on nondiscriminatory economic considerations, it is not for us to examine the Respondent's business reasons underlying its decision to transfer Christ at the expense of two less senior employees.

of hiring Manginelli's brother-in-law. This is pure speculation.[19]

Our dissenting colleague erroneously assumes that, after Christ was transferred, the Respondent hired Durkot to perform work at the Newark Armory project that Yutko and Wingo could have performed had they been transferred to that project rather than laid off. In fact, as explained above, Durkot, who was not a plumber, worked as a "general helper" to Lanza for about 6 weeks. We find nothing unlawful in the Respondent's choosing to have, in effect, a laborer perform this work rather than a journeyman and/or an apprentice plumber. Nonetheless, even if Durkot was performing work that Yutko and Wingo *could* have performed, we believe that, in these circumstances, it is not within the Board's discretion to decide how the Respondent should have staffed this project.[20]

In sum, in light of all of the evidence detailed above, we find that the Respondent has shown that it would have laid off Yutko and Wingo even in the absence of their union activities. The fact that the Respondent made a valid offer of recall to Yutko in June only underscores our finding that the layoffs were made for legitimate business reasons.[21] We therefore reverse the judge's finding that the layoffs violated Section 8(a)(3) and (1), and we dismiss these allegations.[22]

[19] In any case, the Respondent's supposed goal of keeping its "core" group of employees employed is overstated with respect to Wingo, who had been employed by the Respondent for less than 2 months at the time of his discharge. Our dissenting colleague maintains that, even though Wingo had been employed for such a short time, he was nevertheless a permanent employee of the Respondent. This fact, however, does not make Wingo a core employee.

[20] Given that there is nothing in the Act that prohibits an employer from engaging in nepotism, we disagree with our dissenting colleague that the Respondent's favoring of Manginelli's brother-in-law over one of its permanent employees constitutes evidence that the Respondent violated the Act. *Airborne Express*, 338 NLRB 597, 606 (2002) ("Nepotism, one of the older human social behaviors, does not constitute evidence that the employer is engaging in illegal discrimination.").

[21] Our dissenting colleague contends that the recall of Yutko "does not erase the violations that were committed." However, since we have already—and independently—found that the Respondent's layoffs of Yutko and Wingo were not unlawful, there are no violations to "erase." Rather, the fact that the Respondent recalled Yutko only confirms what we have already found, that the layoffs of Yutko and Wingo were not unlawfully motivated.

[22] Further, in finding that the layoffs of Yutko and Wingo were not unlawful, we find—and our dissenting colleague agrees—that the judge erred in relying on the Respondent's subcontracting of sprinkler work to Preferred Sprinkler at the Newark Armory as a basis for reaching his contrary finding. There is no allegation in the complaint, and there was no evidence presented, that the Respondent subcontracted work in order to reduce the work of its own employees. There is, however, evidence that, even before the onset of organizational activity, it was common practice for the Respondent to sometimes subcontract its sprinkler work to Preferred.

B. The Demotion of Harris

1. Facts

As noted above, in January, Manginelli designated Harris, who was a third-year apprentice, as a journeyman plumber/pipefitter and gave him a corresponding pay raise. Manginelli testified without contradiction that he decided to elevate Harris to journeyman after he had hired Wingo as an apprentice in order to maintain a 2-to-1 or 3-to-1 ratio of journeyman plumber/pipefitters to apprentices.

On January 12, after the Respondent had already elevated Harris to journeyman for its own purposes, Manginelli wrote a letter to Robert Colangelo, the apprenticeship coordinator for the Monmouth County School District, formally requesting permission to elevate Harris to journeyman status. In a letter dated February 15, Colangelo denied this request on the grounds that Harris had not yet completed the requisite hours of related training courses, as mandated by the applicable regulations. Colangelo stated that, pursuant to these regulations, an individual must complete 4 years of continuous employment consisting of 8000 hours and 576 hours of related training courses in order to be eligible for journeyman status.[23] When the Respondent elevated Harris, he had only taken 444 hours of the required training courses.

On February 24, after receiving the letter from Colangelo, Manginelli informed Harris that he could not be elevated to journeyman status, and that he would be returned to apprentice status the following week. Manginelli further informed Harris that, consistent with this demotion, his pay would revert to the apprentice rate.

2. Findings

The judge concluded that the Respondent violated Section 8(a)(3) and (1) by demoting Harris from journeyman to apprentice and by reducing his pay to the apprentice rate. The Respondent asserts that it had no choice but to demote Harris and to reduce his pay because he did not meet the qualifications for elevation to journeyman status under the applicable regulations.

The judge found that the Respondent's asserted defense failed because, even though Harris did not qualify for journeyman status under the applicable regulations, "this [did] not mean that [the Respondent] could not call Harris whatever [it] wanted" or that it could not continue

[23] In his letter to the Respondent, Colangelo stated that an individual at the U.S. Department of Labor, Bureau of Apprenticeship and Training, was his source for the Federal requirements for journeyman status. Neither the General Counsel nor the Respondent has challenged Colangelo's interpretation of these regulations.

to pay him at the journeyman rate.[24] The judge further reasoned that Harris' demotion was unlawful because it was related to Wingo's lay off, which, as explained above, he also found to be unlawful. Thus, the judge found that the Respondent, in the interests of maintaining the desired journeyman-to-apprentice ratio, would not have been able to demote Harris back to apprentice status had Wingo not been unlawfully laid off.[25] For these reasons, the judge implicitly found that the Respondent, in demoting Harris, did not rely on Harris' lack of qualification for journeyman status, but rather used this as a pretext for punishing him for engaging in union activity. The record does not support the judge's finding.

Assuming arguendo that the General Counsel has met his initial burden of showing that Harris' demotion and reduction in pay were unlawfully motivated, we find, contrary to the judge, that the Respondent has demonstrated that it would have taken these actions even in the absence of Harris' union activities. At the outset, given our finding that Wingo's layoff was lawful, we find that that layoff did not form an unlawful basis for Harris' demotion. Given this, we find that the Respondent has sufficiently demonstrated that it would have demoted Harris and reduced his pay even in the absence of his union activity because it has shown that Harris was not even qualified to work as a journeyman under the applicable regulations in the first place.

For although the Respondent had, for its own purposes, elevated Harris to journeyman status in January—before it had formally requested permission to do so—it is undisputed that, under the applicable Federal regulations, he was not qualified for journeyman status at that time because he had not completed the requisite number of hours of employment and training. As noted above, on February 12, about a month after the Respondent requested to elevate Harris, the Respondent was informed of this deficiency by Colangelo, the apprenticeship coordinator for the Monmouth County School District. The Respondent, in turn, informed Harris that, as a result of the deficiency, it would have to demote him back to apprentice and return his pay to the apprentice rate. We are persuaded that, under the circumstances, the Respondent had no alternative but to correct its mistake of prematurely elevating Harris by subsequently demoting him and reducing his pay.

Our dissenting colleague seems to suggest that Harris' union activity somehow shielded him from this corrective action and that, in the context of this union activity, the only way the Respondent could have responded was to keep Harris on as an unofficial journeyman—or, at least, continue to pay him at that rate—just as it had prior to and during the pendency of its formal request to elevate him.

We disagree with our dissenting colleague's contention that the Respondent *could* have kept Harris on as a journeyman for its own purposes. We would not require the Respondent to take an action that would potentially run afoul of the regulations governing the classification of journeyman plumber/pipefitters. Employers that work in the construction industry, such as the Respondent, may be legally bound to comply with a number of state and Federal regulations that govern their particular trades; it may sometimes be necessary for employers to make adverse employment decisions based upon those regulations. We cannot find, as our dissenting colleague apparently would, that the Act prevents an employer from relying upon such regulations as a basis for making valid, nondiscriminatory employment decisions simply because those decisions may adversely affect employees who have engaged in union activity. In this regard, it is well established that the Act does not provide employees with immunity from otherwise legitimate employment decisions simply because of their status as union supporters. See, e.g., *Asarco, Inc. v. NLRB,* 86 F.3d 1401, 1410 (5th Cir. 1996); *Kellwood Co.,* 299 NLRB 1026, 1039 (1990), enfd. mem. 948 F.2d 1297 (11th Cir. 1991); and *Swift Textiles, Inc.,* 242 NLRB 691, 696 (1979).

Consistent with these principles, we do not believe that Harris, who was not even qualified to be elevated to journeyman status, was rendered immune from the demotion and the concomitant reduction in pay by virtue of the fact that he had engaged in union activity. To the contrary, we believe that these actions were wholly in line with the Respondent's undisputed obligation under the aforementioned regulations to hold out as journeyman plumber/pipefitters only those individuals who had completed the necessary requirements for such a position, regardless of their union sympathies.

For all of these reasons, we find that the Respondent has demonstrated that it would have demoted Harris and reduced his pay even in the absence of his union activities. Accordingly, we reverse the judge's finding that the Respondent's actions in this regard violated Section 8(a)(3) and (1), and we dismiss these allegations.

[24] See JD sec. 2(e).

[25] In his affidavit to the Board, which is quoted, in relevant part, by the judge, Manginelli stated, "When Edgar Harris was moved back to an apprentice the ratio was not affected because Kenyatte [Wingo] was laid off by that time. Had Kenyatte [Wingo] not been laid off, then I could not have moved Edgar back to apprentice."

C. The Written Warnings to Harris and Lanza

1. Facts

The record indicates that, prior to March, Manginelli never issued a written warning to any of his employees. However, in March and April, he issued two such warnings to Harris and one to Lanza.

Harris received his first written warning on March 17. The warning stated that his "performance and productivity [had] steadily been declining" since February 1. Specifically, the warning recounted an incident that took place on March 13, when Calello and Leto returned to the CNJ biology building where Harris was working to find him sitting on a bucket "and not working." The judge credited Harris' testimony that this was not the case, that he had finished all of his assigned work that day, and that, while waiting to ask what further tasks he should complete, he sat on the bucket and lowered garbage to the floor.

Harris received his second written warning on April 25. This warning stated that his "performance and productivity [were continuing] to deteriorate and it appear[ed] that [he] was intentionally slowing down work on the job." The warning referred to an incident on April 5, when Harris purportedly installed VAV boxes in the biology building incorrectly. The warning stated that this work had to be redone and that this had cost the Respondent time and money. Although the judge credited Harris' denial that this incident occurred, Harris admitted on cross-examination that he installed the boxes incorrectly and that they had to be redone.

That same day, the Respondent also issued a written warning to Lanza, who was working at the biology building with Harris. This warning alleged that Lanza's productivity was declining and that he was slowing down his work. The judge credited Lanza's denial of these allegations.

2. Findings

The judge found that the Respondent violated Section 8(a)(3) and (1) by issuing written warnings to Harris and Lanza for the asserted reason that they were slowing down work and performing work improperly.

The Respondent contends that it legally issued the warnings to Harris and Lanza. With respect to Harris, the Respondent argues that it had the right to issue the first warning on March 17 because Harris' performance and productivity had been declining, and because he was found sitting on a bucket and not working. The Respondent also argues that it properly issued the second warning to Harris on April 25 because he was continuing to slow down work and because he had installed some VAV boxes incorrectly, which had cost the Respondent time and money. In support of this contention, the Respondent points to Harris' admission on cross-examination that he had, in fact, installed the VAV boxes incorrectly. With respect to the warning issued to Lanza on April 25, the Respondent contends that it was justified in issuing the warning because Lanza was slowing down work and his performance and productivity had been declining. For the above reasons, the Respondent asserts that it would have issued the warnings to Harris and Lanza notwithstanding their union activities.

The judge found that the Respondent's asserted defense for issuing the warnings failed because Harris and Lanza credibly denied that they had slowed down work or performed work improperly. Thus, the judge concluded that the Respondent "manufactured" the warnings in order to "make a record" justifying the ensuing layoffs of Harris and Lanza because they had engaged in union activity.

Assuming arguendo that the General Counsel has met his initial burden of showing that the warnings issued to Harris and Lanza were unlawfully motivated, we find that the Respondent has established that it would have issued the warnings notwithstanding their union activities. See *Wright Line,* supra. In so finding, we recognize that the Respondent, in its capacity as a contractor on the biology building project where Harris and Lanza were working, had a vested interest in ensuring that work on that project was done correctly and done in a timely manner so that the Respondent would not lose time and money. To this end, it is entirely conceivable that it might be forced to discipline employees for slow or substandard work. In our view, this is exactly what it did here.

As noted above, Harris and Lanza denied that they had slowed down work or performed work improperly, and the judge credited these denials. Harris, however, admitted on cross-examination that he had installed the VAV boxes incorrectly, as alleged in his second written warning. Nevertheless, even accepting the judge's credibility resolutions as correct, the Respondent, in the interest of maintaining a productive jobsite, was privileged in issuing the warnings to Harris and Lanza based on its *reasonable belief* that they were slowing down work and/or otherwise acting improperly, even if they were not. See *Goldtex, Inc.,* 309 NLRB 158 fn. 3 (1991) (*Wright Line* defense established by employer's reasonable belief that employee forged magazine subscriptions), enfd. mem. 16 F.3d 409 (4th Cir. 1994). Disciplinary situations such as this often involve conflicting accounts, and the employer must rely on its own judgment to separate fact from fiction and formulate an appropriate response to the situation. In these circumstances, the employer, which has

firsthand knowledge of the situation at hand and its contractual obligations, is in the best position to make these decisions, as long they are based on nondiscriminatory factors. For this reason, it is well established that the "Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated." *Ryder Distribution Resources,* supra, 311 NLRB at 816. See also *Texas Instruments v. NLRB*, 599 F.2d 1067, 1073 (1st Cir. 1979) (the issue is "not to determine how the Board would have behaved under similar circumstances but to determine what in fact motivated the employer").

We are not persuaded by our dissenting colleague's reliance on the Respondent's failure to issue written warnings in the past. Significantly, there is no evidence in the record of any specific occasions on which the Respondent has declined to issue a written warning to another employee whom the Respondent found had slowed down work or had performed work improperly. Since there are no similarly situated employees against whom to compare Harris and Lanza, we cannot find, as our dissenting colleague does, that the Respondent treated Harris and Lanza disparately from other similarly situated employees.

Further, we do not believe that the Respondent was somehow barred from issuing valid, nondiscriminatory written warnings to its employees just because it had not done so in the past. And, for the reasons set out above in our discussion of the layoffs of Yutko and Wingo, we find that the Respondent did not lose this right simply because the employees to whom it issued the warnings had engaged in union activity.

For all of these reasons, we find that the Respondent has shown that it would have issued the written warnings to Harris and Lanza notwithstanding their union activities. We therefore reverse the judge's findings that the warnings were unlawful, and we dismiss these allegations.

Finally, having found that the warnings to Harris and Lanza were not unlawful, we reverse the judge's finding that the Respondent issued the warnings in order to "make a record" against these employees that would justify their ensuing layoffs. It is this issue that we next address.

D. The Layoffs of Harris and Lanza

1. Facts

On May 5, a few weeks after issuing the written warnings, the Respondent laid off Harris and Lanza assertedly because of a lack of plumbing work—and more of a need for sheetmetal work—at the biology building project. The Respondent continued to employ Leto, a more senior plumber/pipefitter, on the biology building project. On various weekends during the spring, the Respondent brought in crews of workers to work on the biology building. These individuals were not listed on its certified payroll as having worked during this time.[26] The Respondent did not hire any new plumbing/pipefitting employees to work on the biology building project after it laid off Harris and Lanza. Finally, as noted by the judge, during the last week of March, the Respondent used Mike Valente, a retired plumber, and Mike Durkot, who, as noted above, was Manginelli's brother-in-law and was not a plumber, at the Newark Armory. Valente apparently moved pipe and installed sprinkler piping and Durkot delivered materials to the Armory and helped Valente lift pipe.

2. Findings

The judge found that the Respondent violated Section 8(a)(3) and (1) by laying off Harris and Lanza on May 5, ostensibly due to a lack of plumbing work at the biology building.

The Respondent contends that it was forced to lay off Harris and Lanza because the biology building project primarily involved sheetmetal work, which Harris and Lanza were not qualified to do, and there was very little plumbing work on that project at the time. For this reason, the Respondent asserts that it decided to keep only one plumber/pipefitter on the project, Leto, who had more seniority than Harris and Lanza. The Respondent argues that, under these circumstances, it would have laid off Harris and Lanza even in the absence of their union activities.

The judge found no merit in the Respondent's proffered defense, as he found evidence that, on various weekends, the Respondent brought in crews of workers to work on the biology building project.[27] In discounting the Respondent's defense, the judge also relied on the fact that, in March, the Respondent had subcontracted sprinkler work at the Newark Armory that had previously been assigned to Lanza, as well as the fact that, in February and March, the Respondent hired "off the books" three other individuals to perform work at the Armory.[28] For these reasons, the judge implicitly found that there

[26] Harris testified that, prior to his layoff, he, Lanza, and some other employees worked at the biology building on weekends. Leto, when asked on cross-examination whether he had occasionally worked at the biology building on weekends, stated that he wished to invoke his "Fifth Amendment" rights; the judge inferred from this response that Leto had done so.

[27] As discussed above, these workers were not listed on the Respondent's official payroll as having worked on these occasions.

[28] Presumably, the judge is referring to Valente and Durkot, but it is not clear from the judge's decision or the record who the third person is.

was not, in fact, a lack of plumbing work at the biology building project, but that the Respondent nonetheless used this as a pretext for retaliating against Harris and Lanza for their union activities. The record does not support the judge's finding.

Assuming arguendo that the General Counsel has met his initial burden of showing that the layoffs of Harris and Lanza were unlawfully motivated, we find that the Respondent has demonstrated that it would have laid them off even in the absence of their union activities. The Respondent presented evidence that the biology building project where Harris and Lanza were working at the time of their layoffs involved primarily sheetmetal work and only a limited amount of plumbing work. Since there is no indication that Harris and Lanza were capable of performing sheetmetal work, we cannot conclude that the Respondent acted unlawfully by laying them off when the plumbing work had, for the most part, run out on that project. The fact that the Respondent did not hire any new plumbing/pipefitting employees to work on the project after Harris and Lanza were laid off further evidences that there was little plumbing work to be done at the project. And, as with Yutko, we find that the fact that the Respondent made offers of recall to Harris and Lanza in June, which the judge found to be valid, further supports the finding that the layoffs were necessitated by business considerations. Since we find that the staffing changes made by the Respondent on the project were based on valid, nondiscriminatory business considerations, we will not question or second-guess its decision to make them. See, e.g., *Ryder Distribution Resources*, supra at 816.

Our dissenting colleague maintains that the judge was warranted in finding that the Respondent's explanation for laying off Harris and Lanza was pretextual. He assumes that there must have been sufficient plumbing work for Harris and Lanza at the biology building because the Respondent sporadically brought in workers to work on this project during various spring weekends.

Contrary to our dissenting colleague's assumption, the fact that the Respondent may have continued to employ other employees on the biology building project after Harris and Lanza were laid off does not necessarily mean that the employees it kept on the project were performing plumbing work that Harris and Lanza would have performed had they not been laid off. In fact, the record reflects that the only individual who was performing plumbing work after the layoffs was Leto. With the exception of Leto, there is no evidence that any other employees, including those that were supposedly brought in to work on weekends, were performing plumbing work at the biology building.

Our dissenting colleague further contends that, even if the Respondent was, in fact, unable to employ Harris and Lanza on the biology building project, it could have made an effort to keep them employed by transferring them to another of the Respondent's projects, as had been its practice in the past. Again, this is sheer speculation regarding how the Respondent *should* have acted under these circumstances. Even assuming that the Respondent had an established practice of transferring employees from project to project in order to keep them employed, we do not believe that it is appropriate for the Board to substitute its judgment for that of the Respondent by holding it to our standard of how we would have staffed the various projects had we been the employer.[29] As explained above, this would constitute an improper substitution of our judgment for that of the Respondent. See, e.g., *Ryder Distribution Resources,* supra at 816.

In sum, we find that the Respondent has demonstrated that it would have laid off Harris and Lanza even in the absence of their union activities. The fact that the Respondent offered to recall Harris and Lanza in June, little more than a month after their layoffs, only underscores our finding that the layoffs were necessitated by legitimate business considerations.[30] Hence, we reverse the judge's finding that these layoffs violated Section 8(a)(3) and (1), and we dismiss these allegations.

ORDER

The National Labor Relations Board orders that the Respondent, Framan Mechanical Inc., Freehold, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies or activities.

(b) Giving employees the impression that their union activities are under surveillance.

(c) Threatening employees with job loss if they select a union to represent them.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[29] Further, contrary to the judge, we do not find that the Respondent's use of Durkot and Valente at the Newark Armory in March bears any legal significance to the May layoffs of Harris and Lanza; nor do we consider the Respondent's subcontracting of sprinkler work at the Armory in March to be relevant to these layoffs.

[30] Since, as explained above at fn. 21, we have already, and independently, found that the layoffs were not unlawful, the fact that the Respondent recalled Harris and Lanza only confirms our finding that their layoffs were not unlawfully motivated.

(a) Within 14 days after service by the Region, post at its facility in Freehold, New Jersey, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER WALSH, dissenting in part.

I join the majority in adopting the judge's findings that the Respondent violated Section 8(a)(1) of the Act by: interrogating employees about their union activities; creating the impression that its employees' union activities were under surveillance; and threatening employees with job loss if they selected a union to represent them.

However, I disagree with the majority's reversal of the judge's findings that the Respondent violated Section 8(a)(3) and (1) by: discharging employees Brian Yutko and Kenyatte Wingo; demoting employee Edgar Harris from apprentice to journeyman, reducing his pay, issuing him two written warnings, and laying him off; and issuing a written warning to employee Thomas Lanza and laying him off.

Discussion

The majority accurately recites the relevant facts in this case. The majority assumes that the General Counsel has met his initial burden of proving that the above-mentioned employment actions were unlawfully motivated. However, the majority concludes that the Respondent has demonstrated that it would have taken these actions even in the absence of the union activities of the employees involved.

To begin with, the majority, in reversing the judge's findings, emphasizes that the Board should not substitute its business judgment for that of the Respondent when it comes to decisions regarding the staffing of its projects and the personnel decisions that entails. In doing so, the majority correctly states that, as long these decisions were made based on "valid, nondiscriminatory" factors, the Board will not interfere with the Respondent's right to make them.

However, the majority misapplied the "business judgment" principle to the facts of this case. That principle does not, as the majority suggests, give employers unfettered discretion to take any employment action they want. Nor does it call upon the Board to turn a blind eye to employment actions that may potentially violate the Act. See *NLRB v. Murray Ohio Mfg. Co.,* 326 F.2d 509, 517 (6th Cir. 1964) (even if there is a "good cause for discharge, if the exercise of this right is tainted with a discriminatory motive under Section 8(a)(3) of the Act, a violation may be found"). This is especially true where, as here, the employment actions at issue are taken against a backdrop of serious unfair labor practices, such as unlawful interrogations, creation of impression of surveillance, and threats of job loss that reveal the employer's unlawful motivation. The majority finds that the Respondent has violated Section 8(a)(1) in these respects. And, as noted above, the majority even assumes that the General Counsel has met his initial burden of showing that the employment actions at issue were unlawfully motivated. Yet, defying logic, the majority then proceeds to view these employment actions as if they occurred in a vacuum. As discussed below, given the backdrop of unfair labor practices in which these actions occurred, and the fact that the evidence in the record contradicts the Respondent's stated reasons for taking these actions, the majority errs in finding that the actions were lawful; thus, the judge's findings that they violated Section 8(a)(3) and (1) should be adopted.

1. First, contrary to the majority, the judge correctly concluded that the Respondent violated Section 8(a)(3) and (1) by discharging Brian Yutko and Kenyatte Wingo.[1] The Respondent asserts that it discharged

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The majority discusses the issue of whether the Respondent intended to "discharge" or "lay off" Yutko and Wingo. The majority's discussion of the Respondent's intent, however, misses the point. The primary issue before the Board is whether the employment actions the Respondent took against Yutko and Wingo were unlawful under Sec.

Yutko and Wingo because there was a substantial reduction in work as a result of the delays in the science building project. However, as the judge found, the Respondent's proffered reason for the discharges was pretextual.

There is no question that the science building project where Yutko and Wingo were working was seriously delayed and that this had caused the Respondent to suffer some significant economic losses; but the inquiry does not end there, as the majority seems to suggest. An employer cannot simply present a legitimate reason for its action—it must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of union activity. See, e.g., *Power Equipment Co.,* 330 NLRB 70, 74 (1999); *Kellwood Co.,* 299 NLRB 1026, 1028 (1990). Moreover, where "the evidence establishes that the reasons given by an employer for its actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for these reasons, absent the protected conduct." *Golden State Foods Corp.,* 340 NLRB 382 (2003), citing *Limestone Apparel,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). See also *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966) (stating that, if a trier of fact finds that an employer's stated motive for an employment action is false, he can infer that there is another motive and that that motive is an unlawful one that the employer desires to conceal). Here, the Respondent has failed to make the required showing.

Significantly, prior to the advent of the union organizing effort, the Respondent predicted that the delays on the science building project would result in it needing *more*, rather than fewer, employees on the project. Specifically, in September 1999, the Respondent's president and owner, Frank Manginelli, requested a change order from Cambridge, the construction management company for the project, to *add* four additional men to the project. When this request was denied, Manginelli sent a letter to Cambridge on December 10, 1999, requesting an extension of time. In that letter, Manginelli anticipated that, if the extension was not granted, the Respondent would have to accelerate its work, and this would cause it to suffer "labor inefficiency in the form of disruption, crowding and acceleration (*increased crew size, overtime, multiple shifts,* and loss of morale)." (Emphasis added.) The Respondent's predictions that it would need more men on the project—as evidenced by these requests for relief—are entirely inconsistent with its subsequent claim, after the union organizing effort had begun, that there was not enough work for Yutko and Wingo on the project, and that it would have to reduce its work force to two plumber/pipefitters—Felenczak and Christ.[2]

In addition, certain credited evidence in the record further undermines the Respondent's claim that it needed to reduce its work force at the science building project at the time that Yutko and Wingo were discharged. In this vein, College of New Jersey Field Superintendent William Rogers and Cambridge Project Executive Brian Murray, who were closely involved in the project, both testified that there was sufficient work for *three or four* plumber/pipefitters at that time; the judge implicitly credited this testimony. The majority offers no reason for disturbing the judge's credibility findings with respect to these individuals. Nonetheless, without any persuasive explanation, the majority casts these findings aside and instead relies upon the implicitly discredited testimony of Manginelli that there was only enough work on the project for two plumber/pipefitters.[3] The majority

8(a)(3), not whether the Respondent intended those actions to constitute a "layoff" or a "discharge."

[2] The majority points out that the Respondent's September letter to Cambridge speaks of the need for more men on the science building project "once the job starts moving at a good pace"; and, they assert that the project was "obviously not moving at a good pace in February." For this reason, the majority contends that the Respondent's September letter requesting more manpower on that project at that time does not evidence that it needed more men in *February.* The majority, in making this contention, erroneously views the September letter in isolation, without regard to the Respondent's subsequent letter to Cambridge, which was written on December, 3 months after the September letter and only 2 months before Yutko and Wingo were discharged. As discussed above, this letter, like the September letter, evidences the Respondent's need for more—rather that fewer—men on the science building project at that time. Thus, contrary to the majority, the Respondent was obviously of the opinion that the project was "moving at a good pace" in the time period leading up to the discharges.

The majority further maintains that "changed economic circumstances" occurred between the time of the Respondent's prediction that it would need to increase its work force and the discharges of Yutko and Wingo—namely, the denial of the Respondent's requests for relief and mounting economic losses. In so arguing, the majority fails to recognize that the Respondent specifically anticipated these "changed economic circumstances." In its request for an extension of time, for example, the Respondent stated that, if its "*request for an extension of time [was] not granted*," the Respondent "would suffer labor inefficiency in the form of disruption, crowding and acceleration (*increased crew size, overtime, multiple shifts,* and loss of morale." (Emphasis added.) In other words, the Respondent predicted that it would need additional manpower for the project *if* the requested relief was not granted, which is precisely what happened. Thus, the majority's suggestion that the circumstances surrounding the project changed so drastically and unexpectedly that they warranted the *reduction,* as opposed to the expansion, of the Respondent's work force is entirely without merit.

[3] The majority contends that Murray, Rogers, and Manginelli were *all* credible because they each gave honest opinions regarding how much work was available at the science building project. Thus, the majority argues that Manginelli's testimony on this issue was not "discredited" simply because it differed from the credited testimony of Murray and Rogers. Contrary to this argument, there is no question

errs in relying upon this discredited testimony as a basis for finding that there was insufficient work for Yutko and Wingo on the science building project.[4]

Moreover, the Respondent's postdischarge hiring of Manginelli's brothers-in-law—Mike Valente and Mike Durkot—to work at the Respondent's Newark Armory project—after Christ was transferred from the Armory to the science building project—also undercuts the Respondent's contention that it had no work for Yutko and Wingo. At the outset, it is significant that Christ, one of the two employees for whom the Respondent maintains that it had work at the science building project, was not even transferred to the project until the *day after* Yutko and Wingo were discharged. In these circumstances, it is difficult to imagine why the Respondent, upon realizing that it only had work for two employees of the three employees it had on the project—i.e., Felenczak, Yutko, and Wingo—would discharge Yutko and Wingo, who had been working on the project and were familiar with it, only to transfer Christ, who was not familiar with the project, there from the Newark Armory. This is especially true given that Christ's transfer to the science building project apparently left a significant amount of unfinished work at the Armory, which the Respondent obviously felt the need to fill, as evidenced by its subsequent hiring of Valente and Durkot.[5]

In any event, even if there was no work for Yutko and Wingo at the science building project—or, as the majority maintains, the Respondent wanted to replace them with Christ because he was more senior—the fact remains that there was still sufficient work for two employees at the Newark Armory. However, rather than transferring Yutko and Wingo to perform this work, consistent with its stated practice of transferring employees from project to project to keep them employed, the Respondent instead decided to discharge them and hire Durkot and Valente "off the books" to perform the work.[6] The majority argues that there is no evidence that the work performed by Durkot and Valente—namely, moving and lifting pipe—was plumbing work that Yutko and Wingo could have performed had they not been discharged. However, Yutko and Wingo, who were both trained in the highly skilled trade of plumbing and pipefitting, *could have* performed these simple tasks just as well as Valente and Durkot. Further, even if the work at the Armory was not actual plumbing/pipefitting work, and was perhaps beneath their skill level, Yutko and Wingo, if given a choice, would likely have preferred performing this work over being discharged.

Thus, aside from the Respondent's groundless defense regarding a lack of work at the biology building project, its summary discharge of Yutko and Wingo without first attempting to transfer them to a project where there *was* work—especially when viewed in the context of the numerous 8(a)(1) violations the Respondent committed the following day[7]—further demonstrates that the Respondent's proffered reason for discharging Yutko and Wingo was pretextual. Further, in light of these circumstances, the fact that the Respondent made a valid offer of recall to Yutko 4 months after Yutko and Wingo were discharged—and well after the organizing drive had died down—does not, as the majority contends, serve to demonstrate that the Respondent discharged Yutko and Wingo for "legitimate business reasons." As the judge

that the judge implicitly credited Murray's and Rogers' testimony that there was enough work on the project for three or four employees. In fact, the judge based his ultimate conclusion that the Respondent's lack of work defense was pretextual, in part, on these credibility findings. Hence, it logically follows that Manginelli's testimony that there was only enough work for two employees on the project—which was, at best, self-serving—was implicitly *discredited.* That being the case, the issue of whether or not Manginelli's opinion was given honestly is irrelevant.

[4] In finding that the Respondent had legitimate economic reasons for "laying off" Yutko and Wingo, the majority emphasizes the Respondent's "consistent" and "corroborated" testimony that there was a slowdown in work on the science building project. The majority's emphasis on the Respondent's self-serving—and implicitly discredited—testimony to this effect wholly ignores the credited testimony of Rogers and Murray that there was no such slowdown. Thus, contrary to the majority, it can hardly be said that the Respondent's testimony is consistent with, and corroborated by, the evidence in the record as a whole.

[5] The judge, however, erred in finding that one or both of these individuals per se "replaced" Christ at the Newark Armory. But, as discussed infra, their hiring was nonetheless significant because they performed work that Yutko and Wingo could have performed had they not been discharged.

[6] The judge found that the Respondent had a policy of trying to keep its "core" group of employees employed by moving them from project to project according to the fluctuation of work. The majority maintains that Wingo, who had only been working for the Respondent for less than 2 months at the time of his discharge, could not be characterized as a member of the "core" group that the Respondent had an interest in keeping employed. However, despite the fact that Wingo was a new employee, he was still a *permanent* employee of the Respondent, while Durkot and Valente were not.

The majority contends that, because the Act does not prohibit nepotism, the Respondent's hiring of Valente and Durkot to work on the Armory project after it had "laid off" Yutko and Wingo due to a lack of work did not constitute evidence that the Respondent violated the Act. The issue, however, is not whether nepotism is unlawful, or even whether it is evidence of unlawful conduct. The issue is whether, given the evidence of the Respondent's unlawful motivation, the Respondent has proven that it would have laid Yutko and Wingo off in the absence of those unlawful considerations. The fact that the Respondent hired Manginelli's family members after "laying off" Yutko and Wingo is persuasive evidence tending to show that the Respondent has not met this burden of proof.

[7] On February 11, the day after Yutko and Wingo were discharged, the Respondent unlawfully interrogated employees about their union activities, created the impression that its employees' union activities were under surveillance, and made threats of job loss.

recognized, the valid offer of recall tolls the Respondent's backpay liability to Yutko; it does not erase the violations that were committed. Accordingly, the judge's finding that the discharges violated Section 8(a)(3) and (1) should be adopted.[8]

2. Second, contrary to the majority, the judge correctly found that the Respondent violated Section 8(a)(3) and (1) by demoting Edgar Harris from journeyman to apprentice and by reducing his pay to the apprentice rate. The Respondent contends that it "had no choice" but to demote Harris and reduce his pay because it had been advised by Robert Colangelo, the Monmouth County apprenticeship coordinator, that, pursuant to the applicable Federal regulations, Harris had not met the necessary employment and training requirements to be elevated to journeyman status. However, as the judge found, the Respondent's stated reason for demoting Harris and reducing his pay was pretextual.

Although it appears that Harris was not qualified for journeyman status under the applicable regulations, as cited by Colangelo, this was not the real reason for the demotion. As discussed below, the Respondent did not appear to be concerned with Harris' lack of qualification under these regulations until *after* it learned that he had engaged in union activity.

In this regard, before Manginelli had even contacted Colangelo with a formal request to elevate Harris to journeyman and before he knew that Harris had engaged in union activity, he had already "unofficially" made Harris a journeyman and had given him a corresponding pay raise. It is reasonable to infer that, at the time this was done, Manginelli—who had been working in the plumbing industry for a number of years—was well aware of the fact that Harris fell short of meeting the necessary requirements for journeyman status. However, despite these shortcomings, and the fact that Manginelli had not yet sought approval for doing so from Colangelo, Manginelli was nonetheless willing to elevate Harris to journeyman and to hold Harris out as a journeyman while he was working on its projects.

Thus, it appears that the Respondent was indifferent to the regulations governing the classification of journeyman plumber/pipefitters in January, when it decided to elevate Harris from apprentice to journeyman. However, in February, after the Respondent had learned of Harris' union activity, it readily seized upon the regulations as a reason for demoting him back to apprentice and reducing his pay. In the context of the Respondent's demonstrated antiunion animus—as evidenced by the 8(a)(1) violations discussed above—it may reasonably be inferred that the Respondent's prior indifference to these regulations would have continued had the Respondent not learned that Harris had engaged in union activity. And, had that been the case, the Respondent would likely have kept him on as a journeyman and/or continued to pay him at the journeyman rate for its own purposes even after its formal request to do so had been denied, just as it had prior to and during the pendency of this request. Given these circumstances, it is logical to conclude that the intervening factor in the Respondent's decision to change its course and comply with the regulations was its newfound knowledge of Harris' union activity.[9]

For this reason, the Respondent's proffered defense for demoting Harris and reducing his pay was a pretext designed to conceal its true reason for taking these actions. Accordingly, the judge's finding that it violated Section 8(a)(3) and (1) in these respects should be adopted.

3. Third, contrary to the majority, the judge correctly found that the Respondent violated Section 8(a)(3) and (1) by issuing two written warnings to Harris and one to Thomas Lanza. The Respondent asserts that it issued the warnings to Harris because his performance and productivity had been declining and because he had incorrectly installed some VAV boxes. Further, the Respondent contends that it properly issued the warning to Lanza because his performance and productivity had also been declining. But, as the judge found, the Respondent's stated reasons for issuing the warnings were pretextual.

Significantly, prior to the advent of the union organizing effort, the Respondent had *never* issued a written warning to any of its employees. However, after learning of this effort, it precipitously decided to issue written warnings for the first time to Harris and Lanza, who were two known participants.

Moreover, the judge specifically credited Harris' and Lanza's categorical denial of the allegations the Respondent made against them in the written warnings. The majority does not reverse those credibility findings. Rather, they find that, even accepting the judge's credibility findings as correct, the Respondent lawfully issued the warnings based on its "reasonable belief" that Harris

[8] Although the judge's conclusion that the discharges violated Sec. 8(a)(3) and (1) should be adopted, his reliance on the Respondent's subcontracting of sprinkler work at the Newark Armory was in error. As the majority points out, there is no allegation in the complaint, and there was no evidence presented, that the Respondent subcontracted work in order to reduce the work of its own employees.

[9] The majority places undue emphasis on the Respondent's compliance with the regulations governing the classification of journeyman plumber/pipefitters. The issue before the Board is whether the Respondent's act of demoting Harris and reducing his pay was unlawful under Sec. 8(a)(3) and (1) of the Act, not whether Harris technically satisfied the requirements for journeyman status.

and Lanza had engaged in misconduct.[10] The majority errs.

In order to successfully defend against an 8(a)(3) allegation on the basis of a "reasonable belief" that the employee engaged in misconduct, a respondent must show that its belief was held in good faith and was free from discriminatory considerations. See *Doctors' Hospital of Staten Island, Inc.,* 325 NLRB 730 fn. 3 (1998). The Respondent obviously did not make that showing here where the decision to discipline the two employees constituted an abrupt departure from the Respondent's own practice prior to the union campaign.

In sum, contrary to the majority's finding, the Respondent's stated reasons for issuing the written warnings to Harris and Lanza were pretextual. Therefore, the judge's finding that the Respondent violated Section 8(a)(3) and (1) by issuing the warnings should be adopted.

4. Finally, contrary to the majority, the judge correctly found that the Respondent violated Section 8(a)(3) and (1) by laying off Harris and Lanza. The Respondent asserts that it laid these individuals off because there was a lack of plumbing work at the biology building project where they were working, and because the majority of the work on the project was sheet metal work, which Harris and Lanza were not qualified to perform. As the judge properly found, however, this proffered rationale was pretextual.

Despite the Respondent's claim that there was virtually no plumbing work at the biology building project, the evidence in the record indicates that the Respondent had brought in crews of workers to work on the project on weekends. The majority asserts that there is no evidence that any of these workers were performing plumbing work, as opposed to sheet metal work. To the contrary, it appears that one such worker was Leto, a plumber/pipefitter, whom the Respondent continued to employ on the project after the layoffs. In addition, Harris testified that, prior to their layoffs, he and Lanza had also worked on the project on weekends. This evidence indicates that the biology building project had more plumbing work than could typically be performed during regular working hours, and this, in turn, undermines the Respondent's contention that there was so little plumbing work at the project that it was forced to lay off Harris and Lanza.

In any event, even if there was no work for Harris and Lanza at the biology building project, the Respondent could have employed them on another of the Respondent's projects, consistent with its stated practice of transferring its employees from one project to another in order to keep them employed. Instead, the Respondent decided to lay off Harris and Lanza rather than follow its own past practice.

Given these circumstances, the Respondent's stated reason for laying off Harris and Lanza was false, and the Respondent has, in turn, failed to demonstrate that it would have laid off these individuals even in the absence of their union activities. Moreover, in view of the evidence discussed above, and in the context of the Respondent's numerous 8(a)(1) violations, the fact that the Respondent subsequently decided to make offers of recall to Harris and Lanza does not detract from this finding. Again, the recall offers bear on the issue of appropriate remedy, not on the question of whether the layoffs were unlawful. Accordingly, the judge's finding that the layoffs violated Section 8(a)(3) and (1) should be adopted.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union support or activities.

WE WILL NOT give you the impression that your union activities are under surveillance.

WE WILL NOT threaten you with job loss if you select a union to represent you.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

FRAMAN MECHANICAL INC.

Patrick E. Daley, Esq. and *Mellisa J. Ralph, Esq.,* for the General Counsel.

[10] Although the majority apparently accepts the judge's credibility findings as correct, they point to Harris' statement on cross-examination that he had installed the VAV boxes incorrectly. Even if this were true, however, Harris testified that he—as well as many other employees—had made the mistake in the past (because it is apparently an easy mistake to make), and no one had ever received a written warning for doing so.

Eric C. Stuart, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on January 23–25, and February 7–9, 2001. The charge and amended charges in Case 22–CA–23845 were filed on February 25, and April 7 and 12, 2000. The charge in Case 22–CA–24031 was filed on June 1, 2000. A complaint was issued in Case 22–CA–23845 on May 26, 2000, and an order consolidating cases and amended compliant was issued on September 28, 2000. In pertinent part, the amended complaint alleged as follows:

1. That on or about February 10 and 11, 2000, the Respondent, by Frank Manginelli, the Respondent's owner, interrogated employees about their union activities, created the impression that the Respondent was surveilling employee union activities, and threatened employees with layoffs.

2. That on or about February 10, 2000, the Respondent, for discriminatory reasons, laid off Brian Yutko and Kenyatte Wingo.

3. That on or about February 14, 2000, the Respondent by its supervisor, Frank Calello, interrogated employees about their union activities.

4. That on or about February 15 and 17, at meetings held at the Company's office, the Respondent by Manginelli engaged in unlawful interrogation, and created the impression of surveillance.

5. That on or about February 24, 2000, the Respondent demoted Edgar Harris from journeyman to apprentice and reduced his pay.

6. That on March 17, 2000, the Respondent, for discriminatory reasons issued a written warning to Edgar Harris.

7. That on April 25, 2000, the Respondent, for discriminatory reasons issued written warnings to Edgar Harris and Thomas Lanza.

8. That on or about May 5, 2000, for discriminatory reasons, the Respondent laid off Edgar Harris and Thomas Lanza.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE OPERATIVE FACTS

A. The Company's Business

The Company is a contractor located in Freehold, New Jersey, and is engaged in the building and constructions trades industry. It mostly bids for public projects and as such, virtually all of its work is covered by prevailing wage statutes. In this sense, it theoretically holds no particular labor cost advantage against union contractors inasmuch as the prevailing wage regulations normally requires a nonunion contractor to pay the same wages and equivalent benefits as union contractors.

The Respondent holds itself out as a contractor providing pipefitting, HVAC and sprinkler services. For the most part, however, it performs plumbing, pipefitting, and duct work, the latter for heating, air-conditioning, and ventilation systems. Most of the work done by the Respondent is carried out in New Jersey, although it will bid for and has done work in New York.

Duct work is carried out by sheetmetal workers and they constitute a somewhat separate group of skilled employees from the plumber/pipefitters. The separate group of sheetmetal workers are not involved in this case at all.

From time to time, the Company bids for sprinkler work, either separately or as part of a plumbing contract. In this connection, it may perform all or part of such work with its own pipefitting/plumbing employees or it may subcontract a portion of such work to a specialty company that installs sprinkler systems. (It usually uses a person named Steve Jankowitz who installs sprinklers and is the owner of a company called Preferred Sprinkler.) There was competing testimony about the ability of pipefitters to install sprinklers, with some of the Company's plumber/pipefitters, such as Thomas Lanza, testifying that they are capable of and have installed sprinklers. On the other hand, Frank Manginelli, the Company's owner, who is himself certified to install sprinklers, testified that although the installation of mains and branches to the sprinkler heads can be readily done by his plumber/pipefitters, the last mile, so to speak, from the branch to the sprinkler head is more easily and efficiently accomplished by people who have more experience with and expertise with sprinklers. The issue, according to Manginelli, has to do with codes and the correct spacing of sprinkler heads in the ceiling so that the flow of water entirely covers the area designated.

The Company employees a core group of people which it tries hard to keep employed as much as possible even if that means that it will put them in the shop when no other work is available in the field. Frank Manginelli testified that he tries to keep his core group employed at all times because an advantage in being a nonunion shop is that he can move his people from job to job all over the State of New Jersey, without having to hire a new group of people at each new location depending on which local union covers a particular territory. He testified that his men work for him for 8, 9, or 10 years and this allows him to trust the people he employs and that they, in turn, trust him. (The issue of trust is, in my opinion, significant and will come up later in some of the conversations between employees and Manginelli.)

The core group of plumber/pipefitters consists of about 9 or 10 individuals, including Calello, who is the foreman. While people have come and gone for various reasons, and although the Company may need to supplement this core group by temporarily hiring other people when there is an overflow of work, the core group of plumbers/pipefitters in February 2000, excluding Frank Calello, its field foreman, consisted of the following people.

Name	*Classification*	*Date of Hire*

Peter Felenczak	Pipefitter/plumber	7/5/93
Vinnie Leto	Pipefitter/plumber	7/5/93
Carl Cochran	Pipefitter/plumber	10/12/94
Brian Yutko	Pipefitter/plumber	7/5/98
Thomas Lanza	Pipefitter/plumber	3/23/98
Edgar Harris	Plumber-apprentice	[1]10/31/96
Eric Christ	Pipefitter-apprentice	4/20/98
Kenyatte Wingo	Plumber-apprentice	12/27/99
Domingo Hernandez	Helper-apprentice	[2]12/23/99

As of February 1, 2000, the Company was working on a number of projects. The three major ones were (1) a plumbing contract for a science complex of buildings of the College of New Jersey; (2) an HVAC contract for the biology building of the same college (which entailed the use of some plumber/pipefitters in addition to sheetmetal workers); and (3) a sprinkler contract for the Newark Armory. Lesser contracts involved a plumbing contract for Wall Township and a sprinkler job at Montclair State College. By this time, a job at Galloway Township had been substantially completed and there was a small amount of work to install a sprinkler system for a private residence.

The contracts involved with these various jobs, were lump sum contracts and not contracts based on time and materials. That is, under the contracts, Manginelli committed completion of the work by a particular time and at a particular price, thereby incurring the risk of loss, if he failed to meet the contract's specifications. The contracts for the College of New Jersey also contain liquidated damage provisions pursuant to which the Company would incur a specified amount of liability for each day over schedule. Notwithstanding the provisions of these contracts there is, however, a degree of flexibility built into the contracts, so that Framan, if it can't meet the deadline through no fault of its own, or if it incurs costs as a result of the owner making a change in the scope of the work, can ask for more money and can sue if there is an ensuing dispute.

By the same token, the two contracts with the College of New Jersey (science and biology buildings), pretty much allowed Framan to determine (within some limits), the methods, means, and manpower that he was to use to fulfill the contracts. (There is a distinction between work that is on the critical path, and which must be done by a certain time, and work that is not on the critical path where the contractor has more flexibility or discretion in meeting time targets.)

[1] Harris was in his third year in a plumber apprenticeship program. In January 2000, the Company gave Harris a raise so that his wages were equal to those of a journeyman. Subsequently, it retracted that raise and that is an issue in the present case.

[2] Domingo Hernandez was primarily employed to make deliveries to and from the shop to the various jobsites. By January 2000, he had asked to be put in the plumbing apprenticeship program and he was. However, he left on March 24, 2000, and Manginelli testified that Hernandez essentially quit because he didn't want to attend the school required to be part of the apprenticeship program. Thus, although Hernandez seems to have been a regular employee at the time of these events, his contact and relationship with the plumber/pipefitters was somewhat tenuous.

Work on the biology building began in August 1998, and Framan's contract was for the HVAC work. Framan also contracted out certain welding work to another company well before any union activity was involved. Work was completed on the biology building in the summer of 2000, and Framan left that jobsite in August 2000.

The contract for the science building was executed on October 21, 1998. This project involved a number of separate but connected buildings and the job was broken down into phases. Each phase represented a different location on the project and although the phases (phases 1 through 8), were to be done sequentially, there was a degree of overlap between the phases in terms of time. Phase 1 involved the chemistry, physics, and mathematics buildings and work on phase 1 began in October 1998. It was supposed to be completed by June 15, 2000. Work on phase 2 began in November 1999, and Framan's work, at that point in time, was the demolition and removal of old plumbing, sinks, toilets, etc., from what used to be the nursing building.

By the summer of 1999, it was apparent to everyone that there were serious delays in the job mostly caused by the general contractor. On September 13, 1999, Manginelli sent a letter to the construction manager of the science project stating:

> Framan Mechanical does not agree with the latest Job Progress Schedule and will not sign off on it. The reason being the job is four months behind schedule and the completion date on the latest schedule is that which was on the original Job Progress Schedule. In order for Framan Mechanical to agree to such a schedule we will submit the attached Change Order. The Change Order will cover the addition of four mechanics for a period of 17 weeks once the job starts moving at a good pace. The addition of four mechanics will give Framan the ability to expedite its work and meet the proposed completion date. [Calls for additional cost of $167,176.22.]

Cambridge quickly responded and denied Framan's request for a change order. That letter stated:

> Your Change Order as proposed is not accepted. Please provide detailed information to substantiate your claim of additional manpower required to complete this project on time.

It should be noted that although Manginelli attributed the two layoffs on February 10, 2000 (Yutko and Wingo), to the delays in the science building project, it could be argued, as shown by his letter of September 13, 1999, that the delays caused by the general contractor would result in him needing more, not less employees, in order to make up for the delay.

On December 10, 1999, Manginelli sent another letter to Cambridge, this time asking for an extension of time under his contract and claiming that there was a 6-month delay on the science project. The purpose of this letter was to make a record that the delay was not Framan's fault so as to defeat any future claim by the owner for liquidated damages for untimely completion. Cambridge responded that the claim of a 6-month delay was not substantiated.

By February 2000, sprinkler work was scheduled to begin in the nursing building. But because of design/engineering issues that were *not* caused by Framan, it became apparent that the

sprinkler could not commence. The evidence is that Framan had planned to subcontract out the sprinkler work involved at this location.

There is no question but that by February 2000, and earlier, the science project was a mess and was at least 4 months behind schedule. (In actuality, the sprinkler problem at the nursing building was not resolved until 2001, and no sprinkler work was done there for over a year.) The question is, however, whether that mess meant that Framan was forced to reduce its overall work force, especially considering the fact that the evidence shows that Manginelli has, in the past, made every effort to keep his core group employed at all times.

As of February 1, 2000, the Company employed the following people as pipefitters, plumbers, and plumber apprentices.[3]

Frank Calello. Hired in March 1999 as field foreman. He is listed on the certified payrolls for the science and biology buildings for a few hours per week.[4] I do not know if Calello ever did any physical labor at any of these sites although he does appear on various of the certified payrolls as a plumber or pipefitter. The Company concedes that he is a supervisor within the meaning of the Act and it appears that he and Frank Manginelli are in charge of all the Company's projects.

Vinnie Leto. Pipefitter assigned to the biology building. Hired in 1993.

Carl Cochran. Plumber assigned to a job at Wall Township. He had previously worked at the Galloway job in December 1999. Cochran was hired in October 1994.

Pete Felenczak. Plumber assigned as the lead plumber at the science project. Hired in July 1993.

Brian Yutko. Plumber assigned to the science building since October 1999. Hired in July 1998. Terminated on February 10, 2000, while working at the science building.

Kenyatte Wingo. First year apprentice assigned to the science building. Hired in late December 1999, and initially assigned to the biology building for a short time. Terminated with Yutko on February 10, 2000, while employed at the science building.

Thomas Lanza. Plumber assigned, with a helper, to do the sprinkler system at the Newark Armory. During January and February 2000, he also was assigned for short periods to the science building and to Wall Township. Lanza was hired on March 23, 1998. In March 2000, Lanza was transferred to work at the biology building and the sprinkler work was taken over by Steve Jankowitz the owner of Preferred. Lanza had previously worked for the Company and was rehired in 1998. Lanza was let go in May 2000, while working at the biology building.

Edgar Harris. He was in his third year as an apprentice plumber who had been hired in October 1996. As of February 2000, Harris had been given a raise to the journeyman's rate and designated by Manginelli as a journeyman. This was done, in part, because Harris was assigned to finish up work by himself at the Galloway job which required that the work be done by a journeyman.[5] Harris was transferred to work at the biology building on February 21, 2000. He was terminated on May 5, 2000, while working at the biology building.

Eric Christ. Apprentice plumber assigned to the Newark Armory to help Tom Lanza. In early February 2000, he also was assigned to do work at the biology building. On February 11, 2000, Christ was permanently assigned to the science building. It is noted that the credible testimony of Lanza is that after Christ was transferred to the science building, a man named Mike Durkot, who is Manginelli's brother-in-law, was assigned to work as his helper at the Newark Armory for at least 5 or 6 weeks. Christ was hired in April 1998.

Domingo Hernandez. At this time he was listed as a first year plumber's apprentice and was assigned to help Carl Cochran at Wall Township. However, he didn't play much of a role in this case as he essentially quit in March 2000. He was hired as a driver on December 23, 1999. (Hired at about the same time as Wingo.)

B. The Union's Organizing Campaign

The Union, through an individual named Tom Tighe, began its attempt to organize the plumbing/pipefitting employees of the Respondent in or about December 1999. This came about when an employee of the Company, Brian Yutko, contacted Local 9 and was connected to Tom Tighe. Subsequently, Tighe contacted most of the employees either over the phone or face-to-face in meetings held in late December 1999. Other employees who signed union authorization cards were Cochran, Wingo, and Harris. Felenczak was not approached to sign and Leto who was approached, ultimately refused.

There is no question but that the Company had knowledge of the organizing activity no later than January 12, 2000. Tighe initially telephoned the Company in January and managed to arrange a meeting later in the month with Manginelli's brother and accountant, John Manginelli. Tighe also visited jobsites to talk to some of the workers.

On February 8, 2000, Tighe visited the shop and left word with the secretary because Frank Manginelli was out of the office.

Immediately following Tighe's February 8 visit to the Company's office, a series of actions were taken by the Company as follows.

On February 10, 2000, two of the employees at the science building project were laid off, allegedly for lack of work. These were Brian Yutko, a journeyman, and Kenyatte Wingo, an apprentice.

On or about February 14, 2000, Frank Manginelli asked a number of his employees, what Thomas Tighe had spoken to

[3] I am not counting a man named Nicola Rapisardi who is listed on the certified payrolls of the science and biology buildings as a laborer. He was hired in May 1995, and never became an apprentice of any trade.

[4] For state projects, and because of the prevailing wage law, the contractors are required to submit certified payrolls. These are not submitted in order to determine the amount of reimbursement, but to show compliance with the law. A certified payroll is supposed to list all of the contractor's employees on the jobsite, their respective job classifications, their rates of pay, their hours of work, and their compensation.

[5] According to Frank Manginelli, contracts with New Jersey require that there be two or three journeyman to each apprentice assigned to work on a jobsite.

them about. This was accompanied by statements to some employees to the effect that if they chose to talk to a union representative they no longer could be trusted and they could lose their jobs.

On or about February 15, 2000, Manginelli had his brother John address a meeting of the plumber/pipefitters to address some of the things that Tighe had said about the Company.

On or about February 24, 2000, the Respondent, which had, before any of these events, given Edgar Harris a raise to journeyman rates, reduced his pay back to the rate of an apprentice.

C. The February 10 Terminations of Yutko and Wingo

The Respondent asserts that Brian Yutko, a journeyman and Kenyatte Wingo, a first-year apprentice, were laid off because of lack of work at the science building to which they were assigned. They were told that they were laid off on February 10, 2000, which is 2 days after Tighe visited the office and, according to Manginelli, 1 day after he overheard Vinnie Leto, Pete Felenzcak, and maybe Eric Christ talking about the Union asking them to sign something. As noted above, Yutko was the person who initially contacted the Union and was, with perhaps Cochran, the employee most involved in talking to other employees about the Union.

In his affidavit, Manginelli stated that the science project was delayed and that because work had not begun on phase 2, he didn't have enough work to give to the crew that was then assigned to this job. Manginelli stated that around the first week of February 2000, he *thinks* that he and Calello realized that there was only enough work at the science building for two people (Felenczak and Christ). He stated that there was no place that he could have placed Yutko and Kenyatte as there was not enough work at any of his other jobs for additional people.

There are several problems with Manginelli's account. For one thing, work on phase 2 had already started in November 1999, and consisted of the demolition of the old plumbing and plumbing fixtures in the old nursing building. Although it is true that the installation of the sprinklers for the nursing building was indefinitely delayed, that work was supposed to be done by a subcontractor and not by Framan's own employees.

While it is true that work on the science project was substantially delayed, this does not necessarily mean that there was less work at this time for Framan to do at this site. On the contrary, the project manager, Brian Murray, and the owner's representative, William Rogers, both testified that as of February 2000 and thereafter, there was sufficient work at the science building to occupy three to four plumbers and plumber apprentices. Indeed, Rogers testified that he complained to Manginelli and to Pete Felenczak about what he considered to be Framan's undermanning of the project. Manginelli responded that he did not agree.

Although Manginelli asserts that there was only enough work for Felenczak and Christ, those being two of the four people then assigned to the science buildings, the evidence shows that at the time of the layoffs, Christ was actually assigned to work with Lanza at the Newark Armory and was not assigned to work at the science building until February 11, 2000. (The certified payroll records for the science building shows that Christ appears for the first time at this site during the week ending February 11, 2000, and that he was paid for 7 hours.) As noted above, Christ's place at the Newark Armory was taken by Durkot who is Manginelli's brother-in-law, and who, according to Lanza, had no plumbing experience. Durkot clearly was not one of the Company's core employees.

The Respondent contends that it laid off Yutko and Wingo for lack of work. Nevertheless, the written notice given to Yutko dated February 11, 2000, did not mention that work was slow or that they would be recalled when work picked up. For a company which, for its own interest, needs to retain a core group of employees which it moves from one job to another, the failure to reassure a laid off employee that he would be recalled is strange indeed. (Instead, the February 11 memorandum was an attempt to get Yutko to waive any and all claims he may have arising out of his employment with the Respondent.)

I have no problem with the assertion that the Respondent had, under its contracts with the College of New Jersey, the discretion to man projects in its own way. But that only means that the Respondent had a certain amount of discretion to do what it wanted (within limits), and therefore the question remains as to whether it utilized its discretion regarding job manning to maximize its profits *or* to retaliate against employees who decided to join a union.

In my opinion, the General Counsel has presented sufficient evidence to establish that the layoffs of Yutko and Wingo were motivated by union considerations. The Company was aware of union activity as early as January 2000, and Yutko was one of the employees most active in supporting the Union. (Wingo had signed a union card but otherwise was not active.) The layoffs of these two people occurred almost immediately after Union Agent Tom Tighe visited the office on February 8, 2000, and the timing of the layoffs is evidence of antiunion motivation. Additionally, in the following section, I have concluded that both Manginelli and Calello interrogated employees about the Union on February 11 and 14, 2000, and that Manginelli explicitly stated to Lanza that by talking to the Union behind his back, he no longer could trust Lanza, Harris, and Cochran. Lanza also testified that Manginelli told him, in the context of discussing the Union, that he had stopped bidding for jobs because in order to clean house to eliminate bad employees.

Pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), when the General Counsel makes out a prima facie case of discrimination, the burden shifts to the Respondent to demonstrate that it would have taken the same action irrespective of the employees' union or protected concerted activity. I do not think that the Respondent has met its burden.

As shown above, the asserted reason for laying off Yutko and Wingo was that there was not enough work to be done at the science building because of the project's delays. While there clearly was a delay, the evidence as a whole indicates that this did not result in a net diminution of available work for Framan at this site in February 2000. On the contrary, there was credible testimony that there was an amount of available work which would enable Framan to use three to four men on the jobsite. Moreover, the owner's agent complained to Framan about undermining the job.

Additionally, despite the propensity of the Company (for its own self-interest), to make every effort to retain its core work force, the evidence shows that the Respondent hired Mike Durkot to be a helper to Lanza at the Newark Armory site to replace Eric Christ who was moved, on February 11, 2000, to work at the science building immediately after the layoffs of Yutko and Wingo. Moreover, the evidence shows that the Respondent executed a subcontract with Preferred on March 1, 2000, which resulted in those people taking over the sprinkler work at the Newark Armory and Lanza, who originally had been assigned to do the sprinklers, being moved to the biology building.[6]

D. The Alleged 8(a)(1) Statements

The evidence indicates that in late January or early February 2000, Vinnie Leto told Frank Manginelli that Union Agent Tighe had talked to some of the employees about becoming members of Local 9 and had told them inter alia, that (1) the Company was being sued or investigated by the New Jersey Department of Labor regarding prevailing wage claims; (2) that the Company would not be able to get the necessary bonding allowing it to bid on public projects; and (3) that the Company might go out of business and that its employees might lose their jobs. According to Leto, he approached Manginelli about these matters.

Carl Cochran credibly testified that on February 11, 2000, while working at Wall Township, Frank Manginelli came by at the end of the day and asked if he had spoken to the Union. Cochran testified that he denied this at first but that Manginelli said that he knew that Cochran had spoken to the Union and that after 6 years of employment, he had a right to know what the union agent said about Manginelli and the Company. Cochran testified that he told Manginelli what Tighe had said and at Manginelli's urging, wrote out a note concerning his conversation with Tighe.[7] Cochran also testified that he told Manginelli that he had some difficulty with Calello and was concerned that he might be fired. He states that Manginelli said that he was the one who made discharge decisions and not Calello and that no one was going to be fired unless and until Manginelli said so.

Cochran also credibly testified that about a week later, Calello asked him who the first person was who went to the Union. Cochran testified that he said that he was not going to give any names.

Edgar Harris, who I find to be a credible witness, testified that on February 11, 2000, Frank Manginelli came out to the Galloway jobsite and said, "I know your phone has been ringing all night." Harris testified that he said this was not the case whereupon Manginelli said, "I heard that you [sic] been talking to the Union guy." According to Harris, Manginelli said that he had heard that employees had signed some papers and that the union guy was talking about putting Framan out of business. Harris states that he told Manginelli that he didn't sign anything but that he had spoken to a union agent who said that he could help Framan with his problems with the Department of Labor. Like Cochran, Manginelli urged Harris to write out a statement and he did.[8] Harris also testified that during this conversation Manginelli said, in effect, that if he went union, he would lay everyone off after 30 days.

I also conclude that Thomas Lanza was a credible witness. Lanza testified that in February 2000, he was called to the office by Manginelli who said that he heard that the employees had been speaking to a union representative. (Although Lanza was not sure of the date, this probably occurred on February 11.) According to Lanza, Manginelli asked him to write down what was said. Although reluctant at first, Lanza (like Cochran, Harris and Leto), wrote down a statement.[9] Lanza also credibly testified that he then told Manginelli that he spoke to the union representative only to hear what he had to say and that Manginelli said that Lanza could do whatever he wanted, but that he was very hurt that Lanza went behind his back and spoke to the Union. Lanza testified that Manginelli said that he should have come to him in regards to the Company having problems and that he couldn't trust Lanza anymore. Lanza, in an effort to ingratiate himself, said that he would tell Manginelli whatever Tighe said to him in the future and that Manginelli said that he could no longer trust him, Edgar Harris, and Carl Cochran because they all went behind his back and listened to what the union agent had to say. According to Lanza, at the end of the conversation, Manginelli told him that he has not been bidding jobs lately because every few years he goes through a cleaning house period where he gets rid of bad employees.

On February 15, 2000, the Company called a meeting of the plumbing employees where John Manginelli stated among other things that the Company was in good financial shape, that they had bonding, and that pending prevailing wage rate issues were trivial and would be resolved. The employees were told that they could ask any questions and Frank Manginelli said that the Company, as a nonunion shop, was able to work anywhere in New Jersey and take its own employees to any location without having to hire local plumbers who were members of the local union where the job was being done. In the latter regard, Frank Manginelli testified without contradiction that as a former union plumber he understood that if he had a collective-bargaining

[6] I also note that when Domingo Hernandez quit on or about March 24, 2000, the Company at that time, did not offer to recall Wingo. As noted above, Hernandez and Wingo were first-year apprentices.

[7] The original handwritten note states: "I was told that Framan Mechanical had problems with paying their employees the pay rate on jobs and if one more person went to the board of labor, Framan Mechanical would lose their bonding and would not be able to bid anymore work, and if Framan went union it would help them get more work. Then we talked about the benefit of being union like medical, hospitalization and retirement. I was also told Framan had a limited amount of work left and after that Framan might go out of business."

[8] The statement that Harris wrote out is: "He called me at home ask me to consider joining the Union. He also mentioned some things about the company's future as far as work and labor board. [Referring to Department of Labor]. As far as signing I haven't. He also expressed the need to sit down with the boss to work out some arrangement with the labor board. He said he could help."

[9] Lanza's statement reads: "I spoke to Tom in regard to joining Local. He said Framan Mechanical is having problems on various jobs where he possibly might not get bonding and is being sued. Also problems with wages. He never spoke bad personally about Framan, just that the Company may be falling apart and that he can help all employees singly [sic] or as a company with Frank and that all parties will then be happy. He said he spoke to Frank and that he hopes this meeting will resolve the above issues."

agreement with the plumbers, he would be required to hire local plumbers when working in the jurisdiction of a local plumber's union.

In relation to the above, I conclude that when Manginelli questioned employees about what Union Agent Tighe said to them, he engaged in unlawful interrogation. Manginelli probably asked about these conversations primarily in order to confirm that Tighe was making pejorative statements about his Company.

Under Board law, not all interrogations are automatically considered to be coercive. *Rossmore House*, 269 NLRB 1176 (1984). See also *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). If Manginelli has questioned his employees as to what Tighe had said about his company and this was all that he said, one could possibly come to the conclusion that such questioning was not unlawful if it was solely designed to determine whether untruthful or potentially libelous statements were being published by a union representative to the Company's employees. But that is not the situation here. Based on Lanza's credited testimony, Manginelli also stated that he could no longer trust employees who went behind his back and who talked to the union representative. He also told Lanza that he had not been bidding for more work as a way of getting rid of "bad" employees. Additionally, based on Harris' testimony, I conclude that Manginelli essentially threatened that he would terminate his employees if he was compelled to sign a union contract.

Similarly, I conclude that the Respondent violated Section 8(a)(1) by giving the impression that the employees' union activities were under surveillance. This is shown by statements to Harris and Cochran on February 11, to the effect that Manginelli was aware that they had been talking to a union representative. *Peter Vitalie Co*., 310 NLRB 865, 874 (1993); *Sarah Neuman Nursing Home*, 270 NLRB 663, 680 (1984); and *South Shore Hospital*, 229 NLRB 363 (1997).[10]

On the other hand, the fact that the Employer solicited questions at the meeting held on February 15, 2000, does not, in my opinion, rise to the level of unlawful interrogation. Nor, do I conclude that the Employer illegally threatened employees with job loss by stating what is apparently a truthful opinion to the effect that if it signed a contract with the Plumbers' union, it might have to hire other employees when it performed work in the jurisdictions of other local Plumbers' unions. This statement was made based on Manginelli's past experience as a union contractor and was not contradicted by anyone from the General Counsel's side.

E. The Demotion of Harris

When Kenyatte Wingo was hired as a first-year apprentice, Manginelli decided to designate Harris, who at the time, was a third-year apprentice as a journeyman and pay him the journeyman rate. In his affidavit, Manginelli stated:

> When I decided to make Edgar Harris a plumber I did so because I hired Kenyatte as an apprentice and you can have only so many apprentices. There is a ratio of apprentices to plumbers that you are allowed to have. I think the ratio is 2 plumbers to 1 apprentice or 3 plumbers to 1 apprentice. So based on the hiring of Kenyatte who was an apprentice, I needed another plumber. So we decided to move Edgar Harris up to a plumber. When Edgar Harris was moved back to an apprentice the ratio was not affected because Kenyatte was laid off by that time. *Had Kenyatte not been laid off then I could not have moved Edgar back to an apprentice*. [Emphasis added.]

It should be noted that insofar as the State of New Jersey is concerned, Harris could not have been designated by Manginelli as a certified journeyman plumber. But this does not mean that Manginelli could not call Harris whatever he wanted. More importantly, this did not mean that Manginelli could not increase Harris' pay to the journeyman's rate that was applicable under the State's prevailing wage law.

Since I have already concluded that the layoff of Wingo on February 10, 2000, was illegally motivated by antiunion considerations, the reduction in Harris' pay back to that of an apprentice was equally unlawful as the reduction was made only because Kenyatte had been laid off. Accordingly, I conclude that the reduction which occurred on February 24, 2000, violated Section 8(a)(1) and (3) of the Act.

F. Warnings Issued to Harris and Lanza

Frank Manginelli seems to be a straight talker when it comes to his employees. Employees agree that "when he doesn't like what your are doing, he will say so in no uncertain terms." However, prior to the advent of the union organizing campaign, he never issued a written warning to any of his employees. And I have little doubt that Manginelli decided soon after he became aware of the union activity that he would need to generate a written record before discharging anyone.

On March 17, 2000, Edgar Harris, who at this time was working at the biology building, received a warning from Manginelli which stated:

> Your performance and productivity has steadily been declining from on or about 2/1/00.
>
> While Frank Calello and Vincent Leto went to the trailer on Monday 3/13 at on or about 1:30 to review blue prints you were left alone to complete certain specific tasks assigned to you. When Vincent Leto and Frank Calello returned, they found you sitting down on a bucket and not working. Furthermore, the work that needed to be done was not yet completed.
>
> Framan . . . does do [sic] pay prevailing wages and benefits to you so that you can be sitting down on the job during working hours. Please be advised that any such acts of slow down or non performance of work will not be tolerated and this company will take any other disciplinary action up to and including suspension and termination of your employment.

[10] In *Peter Vitalie Co*., supra, the ALJ stated that "to tell employees which ones were the ring leaders for the Union when the employees in question had not openly demonstrated their support for the Union leaves the impression among the employees that their union activities are being surveilled." However, in *South Shore Hospital,* supra, the Board rejected the ALJ's conclusion that the respondent had unlawfully created the impression of surveillance based on a statement to the effect that there was talk of having a union all over the hospital. The Board noted that the statement indicated, at most the company was merely aware of the interest in unionization by some of the employees.

On April 25, 2000, Manginelli issued warnings to Harris and Lanza. The warning to Harris stated:

> Your performance and productivity continue to deteriorate and it appears that you are intentionally slowing down work on the job, what normally should take 1/2 of a days work is now taking 3/4 to a full day of work to be completed. This is totally unacceptable. As I verbally explained to you personally on the job site recently, your slowing down on the job is creating delays for this project which has negative consequences both for Framan . . . as well as the project owner. This project's contract is subject to liquidated damages for delays. As you are aware, this is the second warning that I am issuing to you regarding your performance at this project.
>
> In addition to the above, your work quality seems to have deteriorated recently. Specifically, during the week of April 5, 2000 you were assigned to complete the plumbing installation and connection of a VAV Box(s) and other related tasks on the second floor of the project site. The first time you completed the task properly, however the second time you competed the installation incorrectly. This is not acceptable. This will cost Framan time and money to re-do the work, which should have been done correctly initially.

The warning to Lanza made a similar assertion that his productivity had declined and that he was taking too long to do the work assigned to him. Unlike the warnings to Harris, no specific incidents were described.

Harris unequivocally denied the assertions contained in the warnings to him. In relation to the first warning, he testified that he had finished virtually all of the work assigned to him and while waiting to ask a question, he was sitting on a bucket while lowering garbage to the floor below. Indeed, his version of this event is essentially confirmed by Vincent Leto and Calello was not called as a witness by the Respondent. As to the second warning, Harris denied that he had slowed down his work or that he had installed the VAV boxes incorrectly. His testimony in these respects, was not contradicted as Manginelli had no personal knowledge of the events referred to in the warnings and Calello was not called to testify about them. As I found Harris to be a credible witness, I shall also credit his version of the events relating to these warnings.

Lanza also credibly denied that he slowed down his work or otherwise did anything wrong while on the job.

Based on the above, it is my opinion, that the warnings were manufactured by Manginelli for the purpose of making a record so that he could "justify" the termination of these employees. As noted above, Manginelli had described Lanza and Harris as no longer being trustworthy because they had gone behind his back to talk to the union agent. Accordingly, I find that these warnings constituted violations of Section 8(a)(1) and (3) of the Act.

G. The Layoffs of Harris and Lanza

On May 5, 2000, the Respondent laid off Harris and Lanza, ostensibly because of a lack of work. At this time, both were working at the biology building which was completed in about August 2000.

Notwithstanding this claim by the Respondent, the evidence shows that it hired a subcontractor in March 2000 to perform work at the Newark Armory that had previously been assigned to Lanza. Additionally, the evidence shows that the Company hired, off the books, at least three other people to do work at the Newark Armory at various times during at least the months of February and March 2000.[11] At the biology building, there was evidence that on various weekends during the spring of 2000, the Respondent brought in a crew of workers who were not listed as having worked on weekends on the certified payroll.

Lanza credibly testified that Manginelli told him in February 2000, that he had ceased making bids so that he could eliminate his "bad" employees. I do not know with certainty if Manginelli did, in fact, cease making legitimate bids for a period of time after he found out that the Union was attempting to organize his employees. But this credited testimony certainly tends to undermine the entire defense which postulates that the Company had to lay off various employees because it didn't have sufficient work to keep them employed.[12]

Having concluded that Manginelli had expressed antiunion animus, that the Respondent has illegally terminated the employment of Yutko and Wingo and had given illegally motivated warnings to Harris and Lanza, I also conclude that the layoffs of Harris and Lanza on May 5, 2000, were violative of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Framan Mechanical Inc., violated Section 8(a)(1) and (3) of the Act by discharging its employees Brian Yutko, Kenyatte Wingo, Edgar Harris, and Thomas Lanza because of their membership in or support for Plumbers and Pipefitters, Local Union No. 9, UA.
2. The Respondent violated Section 8(a)(1) and (3) of the Act by issuing warnings to Edgar Harris on March 17 and April 25, 2000, and to Thomas Lanza on April 25, 2000, because of their membership in or support for the Union.
3. The Respondent violated Section 8(a)(1) and (3) of the Act by demoting Edgar Harris on February 24, 2000, and reducing his pay rate because of his membership or support for the Union.
4. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies or support.
5. The Respondent violated Section 8(a)(1) of the Act by giving the impression that the employees' union activities were being kept under surveillance.
6. The Respondent violated Section 8(a)(1) of the Act by threatening employees with the loss of their jobs if they selected the Union to represent them.
7. The unfair labor practice found herein affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[11] In his affidavit Manginelli states that when he returned from Spain on March 31, 2000, Frank Calello told him that during the week of March 23–30, he had used Mike Valente to move pipe and install sprinkler piping at the Newark Armory. The affidavit also states that Mike Durkot was also at the Armory job delivering pipe and helping Valente lift pipe.

[12] Cochran, the other employee whom Manginelli described as being untrustworthy, resigned in July 2000, and there is no allegation that this was a constructive discharge in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent contends that it made valid offers of reinstatement to three of the four employees and therefore it should not be required to reoffer them reinstatement as part of this Order. It also argues that any backpay owed should be cut off as of the date of the reinstatement offers. No reinstatement offer was ever made to Kenyatte Wingo and therefore these arguments do not apply to him.

Lanza testified that on June 13, 2000, he received a phone call from Calello who said that he got Lanza's job back. According to Lanza, he responded that he didn't want to work for Framan and couldn't understand why Calello was calling him back. Lanza testified that Calello said that he was calling him back and again asked if he wanted the job. After some give and take, where Lanza said, in effect, that he was upset about being accused of slowing down the job and engaging in other misconduct, Lanza reiterated that he did not want to go back to work for Framan.

By letter dated June 12, 2000, sent to Lanza by next day Federal Express, Manginelli wrote as follows:

> RE: NOTICE TO RETURN TO WORK from Layoff status.
>
> Dear Tom:
>
> Confirming Frank [Calello's] telephone conversation with you on this date, please be advised that you are hereby requested to return to work at Framan Mechanical Inc. effective tomorrow.
>
> As instructed by Frank Calello, please report to the Biology Building jobsite.

Edgar Harris testified that on June 16, 2000, he received a phone call from Frank Calello who said that he could return to the biology building at 8 a.m. in 2 days. Harris testified that at this time he was working at a union job and responded: "You really expect me to come back to be harassed and written up and lied on?" According to Harris, he told Calello that he would speak to the union business agent about the offer and get back to him. Harris states that he then spoke to Tighe and decided not to return to work at Framan.

By letter dated June 16, 2000, sent next day delivery, Harris received an offer of reinstatement which read as follows:

> Confirming Frank Calello's telephone conversation with you on this date, please be advised that you are hereby requested to return to work at Framan Mechanical Inc., effective Monday June 19, 2000

Following up on the letter dated June 16, Manginelli sent another letter to Harris dated June 22, 2000. This read:

> On Friday, June 16, 2000 you were contacted by telephone by Foreman/Supervisor Frank Calello. During that conversation, Mr. Calello advised you to return to work on Monday June 19, 2000 from your layoff. Your verbal response to Mr. Calello was that you were not interested in returning to work at Framan Mechanical, Inc.
>
> On Friday, June 16, 2000, I personally mailed you a letter by overnight Federal Express and regular US mail reiterating my request that you return to work and requesting that you report to the Biology Building project effective Money, [sic] June 19, 2000.
>
> As of today, you have failed to return as requested. By failing to return to work, your actions dictate that you have voluntarily resigned your position with Framan Mechanical Inc. I hereby accept your resignation effective immediately.

Finally, with respect to Harris, the Company sent him another letter dated September 22, 2000, in which it reoffered him reinstatement. This letter read:

> The purpose of this letter is to offer you immediate, unconditional reinstatement to your employment at Framan Mechanical Inc. Please contact me as soon as possible if you want to return to your position with us.

The evidence shows that the Company, by letter dated June 21, 2000, made an offer to Brian Yutko which read as follows:

> RE: NOTICE TO RETURN TO WORK from Layoff status.
>
> Dear Brian:
>
> Please be advised that you are hereby requested to return to work at Framan Mechanical Inc., effective Friday June 23, 2000.
>
> Please report to the Biology Building job site, at the College of New Jersey in Trenton.

Yutko acknowledges receiving the letter and testified that he called the office and spoke to Donna who is a secretary in the office. Yutko states that he told her that he was not interested in coming back to work for Framan.

By letter dated June 23, 2000, Manginelli sent a letter to Yutko confirming that he had not shown up for work by this date. The letter read:

> On Wednesday, June 21, 2000 I personally mailed you a letter by overnight Federal Express and regular US mail requesting that you return to work and requesting that you report to the Biology Building project effective Friday, June 23, 2000.
>
> This morning you did not report to work as I requested but you contacted Donna at our office asking her to tell me that you are in receipt of my recall letter and that you are not interested in coming back to work from your layoff . . . since you have been working somewhere else and that in effect you have voluntarily resigned your position . . . . I hereby accept your resignation effective immediately.
>
> Thank you for taking time and calling back to notify us of your resignation.

The General Counsel argues that the Respondent's June 2000 reinstatement offers were invalid because they did not give the employees sufficient time to evaluate the offers. He also argues that the subsequent offers in September should not toll backpay inasmuch as they did not sufficiently set forth the positions being offered or the time to respond.

The General Counsel relies on such cases as *Murray Products, Inc*., 228 NLRB 268 (1977), enfd. 584 F.2d 934, 940 (9th Cir. 1978); and *Brenel Electric*, 271 NLRB 1557 (1984). In *Murray Products*, supra, the Board stated that striking employees had a fundamental right to have a reasonable time to consider whether or not they wished to return to work. In *Brenel Electric*, supra, the Board held that reinstatement offers made to illegally discharged employees did not allow them sufficient time to respond. In *Brenel*, the Board also held that some of the offers were also invalid because they were, in fact, offers of temporary employment.

The Respondent relies on *Esterline Electronics Corp.,* 290 NLRB 834 (1988), where the Board modified its position as taken in *Penco Enterprises, Inc.*, 216 NLRB 734 (1975); *Murray Products*, supra; *Brenal Electric*, supra, and *Fredeman's Calcasieu Locks Shipyard*, 208 NLRB 839 (1974). The Board stated:

> We have reconsidered the question regarding a discriminatee's duty to respond to an offer of reinstatement because several Courts that have reviewed the Board's current rule have rejected it. The reasons for rejecting the Board's current rule were best stated by the Tenth Circuit in *NLRB v. Betts Baking Co*., 428 F.2d 156, 158 (1970):
>
> > Both employer and employee are bound by the requirement of good faith dealings with each other. And it does not place an undue burden on the employee to require him to inform his employer of his intentions concerning reinstatement within a reasonable time after notice.
>
> Thus, the court in *Betts* reasoned that an offer of reinstatement is not rendered invalid simply because it affords the discriminatee what may be regarded as an unreasonably short period of time in which to consider it. We agree.
>
> When a discriminatee receives a letter that unconditionally offers reinstatement and that also states a report—back date, we will not find the offer invalid simply because the specified reporting date appears unreasonably short. The offer will be treated as invalid, however, if the letter on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date or if the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date. If the letter does not expressly condition the offer on compliance with the report-back date, the discriminatee cannot know, until he or she calls the employer, whether that date is inflexible and whether a reasonable time for making a decision on the offer will be granted. Similarly, until the discriminatee replies, the employer cannot know when the discriminatee would be able to return.
>
> . . . .
>
> A discriminatee who receives an otherwise valid offer . . . cannot rely on the mere inclusion of an unreasonably short report—back date in the letter to justify a failure to make some response to the employer, if only to ask for more time to consider the offer. A failure to make such a response within a reasonable time after the offer has been made will toll the running of backpay.[13]

The evidence shows that the June reinstatement offers to Lanza, Yutko, and Harris were *not* conditioned on their acceptance or return by a specified date. Nor does the evidence indicate that the discriminatees were particularly conflicted or ambiguous about their refusal to return to work at Framan. They didn't ask for more time to consider the offers because they had already made up their minds not to return.

In light of *Esterline*, supra, I conclude that the June offers were valid and that they toll backpay as of the time received. Thus, in the case of Lanza, his backpay is tolled as of June 13, 2000. In the case of Harris, his backpay is tolled as of June 17, 2000. And in the case of Yutko, his backpay is tolled as of June 22, 2000. I also conclude that as the reinstatement offers were valid, the Respondent is not legally required to make any further reinstatement offer as part of the remedy to these three individuals. *Bat-Jac Contracting, Inc*., 320 NLRB 891, 894 (1996).

As to Harris, I have also concluded that he was demoted and his pay rate reduced on February 24, 2000, for discriminatory reasons. Therefore, I shall recommend that he be made whole from February 24, 2000, by paying him the difference in his pay rate immediately before that date and the wage rate he received after that date. Further, until his backpay was tolled, his backpay should be calculated on the basis of his pay rate immediately prior to his demotion on February 24, 2000.

With respect to Kenyatte Wingo, it is recommended that the Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his suspension to date of his reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Moreover, as the evidence shows that it is the Employer's practice of moving employees from one job to another, I conclude that Wingo's backpay should not terminate at the completion of the job to which he was assigned at the time of his termination. See *Dean General Contractors,* 285 NLRB 573 (1987), where the Board overruled *Brown & Lambrecht Earth Movers,* 267 NLRB 186 fn. 3 (1983), to the extent that it held that there existed a precompliance presumption against reinstatement in the construction industry.

In all instances where the remedy requires that employees be made whole, the amount, less any interim earnings, as prescribed above, shall include interest as computed in accordance with *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]

[13] I note that in *Esterline Electric,* 271 NLRB at 1561 fn. 4, the Board stated, in substance, that an offer demanding that an employee accept and return to work on the same day that he receives it would presumptively be invalid, except in unusual circumstances.